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No. 83-271

In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

NCAA's statement of the questions presented tends to misrepresent the bases of the decision for which review is sought. Respondents therefore present more accurate versions of NCAA's questions presented.

1. Whether an agreement among universities to establish television packages for football may be held unlawful *per se* when it fixes prices, suppresses product diversity, restricts output, poses substantial risks of cartelization and vertical forecloure, restrains trade more than necessary to promote the efficiencies of the integration, and constitutes the combination of virtually all producers of commercially salable intercollegiate football.

2. Whether an antitrust defendant may obtain a rule of reason analysis for otherwise *per se* illegal restraints by asserting that such restraints are ancillary to other purported goals, without showing the goals are procompetitive, and without showing the restraints are reasonably necessary to the attainment of such goals.

3. Whether the district court's finding, affirmed by the Court of Appeals, that NCAA has sufficient market power to produce anticompetitive effects through its controls over its members' football television rights is clearly erroneous.

4. Whether a combination by virtually every producer of commercially salable intercollegiate football to sell broadcast rights only as a package, on an exclusive basis, to a limited number of buyers, and restricting the total number of games sold, should be treated as a suppression of competition although the package is sold by a process of competitive bidding.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
ADDITIONAL STATUTE INVOLVED	1
STATEMENT OF CASE	1
SUMMARY OF ARGUMENT	11
ARGUMENT AND AUTHORITIES	12
CONCLUSION	30

APPENDIX A:
Memorandum of the United States concerning Application for Stay.

APPENDIX B:
Brief of United States as Amicus Curiae filed in the United States Court of Appeals (10th Circuit).

TABLE OF AUTHORITIES

Cases	PAGE(S)
Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899)	20, 21
Arizona v. *Maricopa County Medical Society*, 457 U.S. 332 (1982)	16, 17, 21, 22
Blalock v. *Ladies Professional Golf Ass'n*, 359 F.Supp. 1260 (N.D. Ga. 1973)	19
Brenner v. *World Boxing Council*, 675 F.2d 445 (2d Cir. 1982), *cert. denied*, U.S. , 74 L.Ed.2d 76	22
Broadcast Music, Inc. v. *CBS*, 441 U.S. 1 (1979)	6, 7, 11, 17-18, 21
Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962)	26-27
Catalano, Inc. v. *Target Sales, Inc.*, 446 U.S. 643 (1980)	17
Denver Rockets v. *All-Pro Management, Inc.*, 325 F. Supp. 1049 (D. Cal. 1971)	22
Fleer Corp. v. *Topps Chewing Gum, Inc.*, 658 F.2d 139 (3d Cir. 1981), *cert. denied*, 455 U.S. 1019	30
Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975)	17
Gunter Harz Sports, Inc. v. *United States Tennis Ass'n*, 511 F.Supp. 1103 (D. Neb. 1981), *aff'd*, 665 F.2d 222 (8th Cir. 1981)	22
Haywood v. *NBA*, 401 U.S. 1204 (1971)	22
Hennessey v. *NCAA*, 564 F.2d 1136 (5th Cir. 1975)	19
Howard University v. *NCAA*, 510 F.2d 213 (D.C. Cir. 1975)	19
International Boxing Club v. *United States*, 358 U.S. 242 (1959)	15, 25, 27
Linseman v. *World Hockey Ass'n*, 439 F.Supp. 1315 (D. Conn. 1977)	22
Louis Dreyfus Corp. v. *United States*, 401 F.Supp. 919 (S.D. N.Y. 1975)	24

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National Society of Professional Engineers v. *United States*, 435 U.S. 679 (1978) 17, 23

North American Soccer League v. *NFL*, 670 F.2d 1249 (2d Cir. 1982), *cert. denied*, ... U.S. ....., 74 L.Ed.2d 639 ..... 19, 27

Northrop Corp. v. *McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir. 1983) 18

Omega Satellite Products Co. v. *Indianapolis*, 694 F.2d 119 (7th Cir. 1982) 30

Pullman-Standard v. *Swint*, 456 U.S. 273 (1982) 26

Reisner v. *General Motors Corp.*, 511 F.Supp. 1167 (S.D. N.Y. 1981), *aff'd*, 671 F.2d 91 (2d Cir. 1982), *cert. denied*, ... U.S. ....., 74 L.Ed.2d 112 27

Reiter v. *Sonotone*, 442 U.S. 330 (1979) 29

Robertson v. *NBA*, 389 F.Supp. 867 (S.D. N.Y. 1975) 19

Tampa Electric Co. v. *Nashville Coal Co.*, 365 U.S. 320 (1961) 30

Timken Roller Bearing Co. v. *United States*, 341 U.S. 593 (1957) 17

Turf Paradise, Inc. v. *Arizona Downs*, 670 F.2d 813 (9th Cir. 1982), *cert. denied*, 456 U.S. 1011 19

Twin City SportService, Inc. v. *Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir. 1982) 27

United States v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964) 30

United States v. *General Dynamics Corp.*, 415 U.S. 486 (1974) 30

United States v. *New York Telephone Co.*, 434 U.S. 159 (1977) 14

United States v. *Topco Associates, Inc.*, 405 U.S. 596 (1972) 16

United States v. *United States Gypsum Co.*, 333 U.S. 364 (1948) 26

AUTHORITIES CONTINUED PAGE(S)

Van Sant v. *American Express Co.*, 169 F.2d 355 (3d Cir. 1947) 24

United States Code

15 U.S.C. §§ 1291-1295 16

Other Sources

McCormick, *Evidence* §336 (1972) 23

Sullivan, *Antitrust* §77 (1977) 22

10 Von Kalinowski, *Antitrust Laws and Trade Regulations* §109.01, *et seq.* 23

9 Wigmore, *Evidence* §2485 (1981) 23

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ADDITIONAL STATUTE INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. §2, provides in pertinent p. rt: "Every person who shall monopolize, or attempt to mo opolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ."

STATEMENT OF CASE[1]

NCAA's statement of the case does not accurately reflect the holdings of the district court and Court of Appeals.

[1] This statement of the case will be referred to in argument, and is numerically paragraphed for this purpose. (*E.g.*, "Statement, ¶ "). Abbreviations are also used for NCAA's Petition for Certiorari ("Petition at ") and references to the opinions of the district court and Tenth Circuit in NCAA's Appendix ("D.C. a; 10th a"). References to Respondents' Appendix will always end with a capital letter (*E.g.*, "*App.* B").

Respondents therefore restate the bases upon which NCAA's television controls were found illegal by both courts.

1. Although NCAA has permitted all the other sports it regulates to operate in a free television market (D.C., 47a), it has controlled football television since 1953 (D.C., 44a). Until 1982, after this action was instituted, NCAA sold a single network the exclusive football television rights for all of its members; from 1965 to 1981, ABC was that network (D.C., 45a). NCAA's present contracts, for 1982-1985, sell exclusive television rights to two networks and one cablecaster, and will operate substantially the same as NCAA's previous contracts (D.C., 61a).[2] Under NCAA's controls, the contracting network(s) pay a "minimum aggregate fee" (D.C., 57a, 61a; 10th, 2a). Part of this minimum aggregate fee is paid directly to NCAA, and the rest is paid to schools whose teams are televised (D.C., 56a). NCAA, after subtracting the amounts allocated to its championship football telecasts, "recommends" [3] that specific uniform amounts be paid by the contracting network(s) for national and regional telecasts, and NCAA recommendations are always the minimum and maximum amounts actually paid for any individual game (D.C., 56a-57a; 10th, 7a). NCAA also sets the minimum and maximum total number of permitted telecasts and the maximum number of appearances per school, and prohibits the sale of football telecast rights outside the NCAA contract with very limited exceptions (D.C., 58a-64a; 10th, 2a-3a).

2. NCAA membership is essential to an institution "wishing to sponsor a major, well-rounded athletic pro-

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[2] NCAA's 1982-1985 contracts with two networks "eliminate any possibility of competitive bidding between the networks" (D.C., 62a). "NCAA substantially dictated the terms under which both networks could televise NCAA football. The networks were offered a take-it-or-leave-it proposition" (D.C., 61a).

[3] NCAA began using the word "recommend" rather than "set" in describing its activities regarding rights fees for individual games in 1976, at the direction of its Executive Director (D.C., 78a).

gram", and affects not just football, but virtually all sports (D.C., 53a-45a). This action was precipitated when the College Football Association ("CFA"), consisting of five major football-playing conferences and 61 independent schools, also members of NCAA, attempted to develop an independent television plan with the National Broadcasting Company ("NBC") while NCAA was negotiating its television plan with NBC's competitors (D.C., 49a). NCAA reacted immediately, consolidating its power in 1981 by adopting a bylaw "official interpretation" (later to become the content of the bylaw interpreted) that: "The [NCAA] shall control all forms of televising of the intercollegiate football games of member institutions during the traditional football season . . ." (D.C., 49a, 111a). The NCAA publicly threatened CFA members with a myriad of sanctions ranging from reprimand to expulsion, affecting not only the football programs of CFA members but other sports as well, and stated that it would seek expedited disciplinary procedures against offending CFA schools (D.C., 51a). NCAA suspended its "campaign of veiled threats and coercion" only after the district court ordered it to do so (D.C., 126a). The CFA contract failed, nevertheless, substantially because of the NCAA intimidation of its members that had already occurred (D.C., 51a, 126a; 10th, 22a).[4]

Price-Fixing and Restriction of Output

3. The district court found that NCAA, through its "minimum aggregate fee", has set the "minimum, maximum, and actual price" paid for the telecasting rights of its members' games (D.C., 87a, 113a); that NCAA controls distort the prices which would otherwise be paid in a free market, and the "raison d'etre" for their existence is to

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[4] This action was originally filed as a class action on behalf of the members of the CFA; NCAA opposed class certification, and when the CFA-NBC contract failed, plaintiffs withdrew their application for class certification on the ground it was no longer needed to protect the interests of the class.

restrict competition (D.C., 93a, 114a);[5] that the prices paid for telecasting rights "is responsive neither to the relative quality of the teams playing the game nor to viewer preference" (D.C., 113a); that "[t]he controls restrict the number of games shown by local telecasters far below that which would be shown in a free market" (D.C., 114a); and that because of the controls, "[m]any games for which there is a large viewer demand are kept from the viewers, and many games for which there is little if any demand are nonetheless televised" (D.C., 115a).

4. The Tenth Circuit held that NCAA has fixed the minimum and maximum total prices for the NCAA television packages (10th, 7a); that the compensation paid by the networks "does not vary from game to game" (10th, 7a); that NCAA's controls consist of "two groups of restraints, those that create an exclusive franchise arrangement with the networks and those that distort the prices paid for the individual games" (10th, 11a-12a); that both the grant of exclusivity and the distortion of prices appear anticompetitive (10th, 12a); and that NCAA controls potentially reduce output of desired products and increase consumption of less desirable products (10th, 10a). The court also noted and relied upon the district court's finding "that without the restraints imposed by the television plan more games would be shown at the local level" (10th, 21a).

5. Both courts addressed NCAA's contention that it should not be subjected to *per se* antitrust scrutiny because its restraints had procompetitive justifications, and were incident to a joint venture.[6] As to NCAA's argument that

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[5] More specifically on the latter point, the court found that the purpose of NCAA's controls is to obtain an artificially high price by restricting output and fixing prices (D.C., 79a, 112a).

[6] Both the district court and Tenth Circuit discussed NCAA's purported justifications in the context of a *per se* analysis and rule of reason analysis. Since the findings of the courts under each standard partially overlapped, they will all be summarized here and not repeated separately in discussing the courts' findings under the rule of reason.

athletic competitive balance was promoted by the television restraints, the district court found that "NCAA has failed to show why this competitive balance cannot be maintained without NCAA acting as the exclusive bargaining agent for its members" (D.C., 70a); that the other extensive regulations of NCAA over its members were sufficient to maintain athletic balance (D.C., 70a, 97a); that NCAA controls contribute only indirectly, if at all, to this goal (D.C., 110a, 115a); and that the "marginal contribution the controls make to preservation of competitive balance is overwhelmed by the violence which the controls inflict on the free market economy" (D.C., 109a).[7]

6. The Tenth Circuit, addressing NCAA's athletic competitive balance justification, held that it appeared to be a noneconomic justification which could not justify a restraint on competition (10th, 11a); that the NCAA appeared to be advancing the impermissible argument that economic competition would destroy the market (10th, 11a); that the district court found on adequate evidence that athletic balance could be achieved by less restrictive means (10th, 11a); and that in fact, since NCAA controls suppressed the number of local broadcasts, eliminating the controls would have the effect of equalizing revenues among NCAA members (*Supra*, note 7).

7. As to NCAA's argument that its restraints increased live gate attendance at its members' games, the district court held that NCAA controls have no effect on gate attendance (D.C., 68a, 107a, 115a), and in any event NCAA does not employ its restraints in order to protect gate at-

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[7] NCAA argued its television controls helped its less prominent football playing members obtain television exposure and revenues. Significantly, the district court found that without NCAA's controls, many more games involving many more schools would have been broadcast, particularly at the local and regional levels (D.C., 59a, 66a, 91a, 114a, 118-119a). The Tenth Circuit, noting and relying upon this finding, held that "[t]his would have the effect of equalizing revenues" (10th, 21a).

tendance, but rather to maximize television revenues to its members (D.C., 69a-70a, 108a, 109a). The court held that "the NCAA's argument regarding gate attendance is either an ill-founded belief at best, or at worst, a deception employed to make the majority of the NCAA membership believe that they should control football television out of self interest" (D.C., 70a).

8. The Tenth Circuit, addressing NCAA's argument that its restraints promoted gate attendance and therefore total spectator viewership of football games, held that it was doubtful "that the output may be properly characterized as viewership" (10th, 10a); that even if it is assumed viewership is output, total viewership — both live and televised — should be considered, and there was no evidence in the record to permit total viewership to be gauged (10th, 10a); that even if total viewership was enhanced, it did not justify NCAA's restraints because it came at the expense of other options by reducing output of desired products and increasing consumption of less desirable products (10th, 10a); and that the restraints were broader than necessary to achieve NCAA's professed goals (10th, 11a).

9. NCAA also contended that its controls facilitated the marketing of college football television by a system comparable to that approved in *Broadcast Music, Inc.* v. *Columbia Broadcasting System*, 441 U.S. 1 (1979). The district court held that the most important distinction between the *Broadcast Music* arrangement and NCAA's is that NCAA members have been forced to agree by the will of the majority not to contract outside NCAA's television plan (D.C., 93a). It held that "[t]he networks pay the extraordinarily high price they pay for NCAA football because of the guarantee of exclusivity" (D.C., 91a); that NCAA's witnesses were not even able to "articulate any credible reason as to *why* it is necessary for NCAA to act as an exclusive agent with the authority to bind all NCAA members to an exclusive contract" (D.C., 96a); that "NCAA controls are not necessary for the protection of NCAA's

members' right to sell their football games for broadcast" and "many more games would be televised in a free market than are televised under NCAA controls" (D.C., 90a-91a); and that college basketball television is exemplary of the fact that college football will continue to be shown even on the network level without the interference of NCAA (D.C., 76a, 48a).

10. The Tenth Circuit, distinguishing this case from *Broadcast Music*, held that here, "the new and different product . . . comes at the expense of the product that would otherwise be offered by the schools" because the "schools are not permitted to sell outside the network contracts" (10th, 14a);[8] that the contracts restrict the total number of games to be broadcast (10th, 14a); that even the NCAA package is sold on an exclusive basis whereas in *Broadcast Music* an unlimited number of blanket licenses were offered for sale (10th, 14a); and that because of the character of the NCAA restraints, "those broadcasters that are unable to bid for the entire package are permanently foreclosed from the market." (10th, 14a).

Group Boycotts

11. The district court found two forms of group boycotts. "First, by granting exclusive rights to certain networks for televising college football, the NCAA essentially agrees not to bargain or make its product available to other broadcasters" (D.C., 67a). "There is an absolute refusal to deal with all of the major competitors of ABC, CBS and TBS" (D.C., 103a). Second, non-members of NCAA cannot appear on television against NCAA members (even outside the NCAA television package), and so "NCAA controls in effect deprive the non-member of the means of producing its final product, a football game" (D.C., 102a, 68a). This

[8] The district court similarly held that the "NCAA has made itself the single seller in the relevant market of college football television, at the expense of the individual sellers" (D.C., 74a).

forces the non-member to attempt to compete against a monopolist (D.C., 54a).

12. The Tenth Circuit held that NCAA members' agreement between themselves and a few members of the television industry to refuse to deal with the remainder of the television industry did not constitute a group boycott because "the television plan does not constitute an attempt by competitors at one level to foreclose competition by traders at the same level" (10th, 23a). The Tenth Circuit held that NCAA members' refusal to appear on television with non-members was not a group boycott either. The court focused on the NCAA rule as an "expulsion sanction" which appeared "to be an enforcement mechanism and not a sham for an anticompetitive purpose" (10th, 25a).

Rule of Reason

13. Both the district court and Court of Appeals evaluated NCAA's television controls under the rule of reason, with the observation that doing so would not offend the interest in litigation efficiency in this particular case (D.C., 105a; 10th, 15a). The district court found that "the history and circumstances surrounding the controls lead readily to the inference that they were intended to restrain and enhance prices" (D.C., 107a); that "[t]he controls dictate which broadcasters and cablecasters NCAA members may deal with, and which they may not" (D.C., 113a); that "NCAA has commandeered the rights of its members and sold those rights for a sum certain", making the price paid for their television rights "responsive neither to the relative quality of the teams playing the game nor to viewer preference" (D.C., 113a); that "[f]ewer different teams would appear on the networks, and more games involving more teams would be telecast by local and regional stations, in the absence of the NCAA controls" (D.C., 114a); and that "the market is not responsive to viewer preference. Every witness who testified on the matter confirmed that the consumers, the viewers of college football television, receive

absolutely no benefit from the controls" (D.C., 115a). The district court concluded that there were no redeeming procompetitive benefits (including protection of gate attendance or preservation of competitive balance) that outweighed these adverse effects on the free market (D.C., 115a).

14. The Tenth Circuit concluded that the NCAA television plan increases concentration in the marketplace, prevents producers from exercising independent pricing and output decisions, precludes broadcasters from purchasing a product for which there are no readily available substitutes, and facilitates cartelization (10th, 22a). The court found that NCAA's assertions of procompetitive benefits "do not overcome the anticompetitive effects of the restraints" (10th, 20a-21a).

15. Both the district court and Tenth Circuit concluded that NCAA had market power over collegiate football television, primarily because of the unique demographic composition of the audience — middle aged male college graduates in the middle to upper income brackets (D.C., 77a, 75a; 10th, 18a). The district court said, particularly, that "[i]t strains credulity to suggest that broadcast programming does not consist of submarkets" (D.C., 76a), and both courts agreed that Saturday afternoon college football television was a relevant market (D.C., 71a-78a; 10th, 18a-19a). Both courts pointed out that Saturday afternoon programming consists largely of sports, cartoons and old movies (D.C., 72a; 10th, 18a); that the most logical substitute for college football, i.e., professional football, is precluded from televising on Saturday afternoon during the college football season by the strictures of its own television antitrust exemption granted by Congress (D.C., 71a, 121a; 10th, 19a); and that other professional sports, e.g., baseball, were not substitutable with NCAA football (D.C., 75a; 10th, 18a-19a). Both courts noted that advertisers spend two and a half times more per viewer to advertise on NCAA football than on the average for other pro-

gramming (D.C., 75a, 120a; 10th, 18a); and that the unique appeal of college football was indicated by the fact that CBS frequently offered no programming at all, i.e., "went dark", in the last few years when ABC had exclusive rights to televise college football (D.C., 72a; 10th, 19a). The district court observed that "ABC was willing to suffer a net loss in televising college football for the benefits it derived from being affiliated with the sport" (D.C., 75a), and the Tenth Circuit held that the networks "need" college football "programming to offer on Saturday afternoon" (10th, 19a).[9] The district court pointed out that ABC and CBS have agreed to pay dramatic price increases [10] for college football programming in the present contracts (D.C., 122a-123a).

Monopolization

16. The district court found NCAA in violation of §2 of the Sherman Act because it had unlawfully obtained monopoly power in a relevant market (D.C. 124a-125a). NCAA did not argue either in the district court or the Court of Appeals that, if it had monopoly power (turning on the question of market definition), it had obtained it lawfully (D.C., 124a-125a; 10th, 20a n. 16). The Tenth Circuit, while affirming the district court's market definition (10th, 18a), found it unnecessary to consider the monopolization claim separately because it "would not affect the scope of the relief granted" (10th, 20a n.16).

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[9] The Tenth Circuit, besides upholding the district court's finding that college football constitutes a unique type of Saturday afternoon programming (10th, 18a), *alternatively* held that even assuming the district court's market definition was too narrow, the evidence showed NCAA to possess enough market power over televised intercollegiate football to make "the risks of cartelization and price enhancement . . . imminent" for purposes of a rule of reason analysis (10th, 20a).

[10] In 1982, the networks paid 62% more per exposure, and 32% more per commercial minute than they did the previous year; by 1985, they would pay 100% more per exposure and 61% more per commercial minute than in 1981 (D.C., 123a).

SUMMARY OF ARGUMENT

Review of this case would be meaningless, given NCAA's prospect of prevailing. Even had both lower courts erred in applying a *per se* analysis, NCAA could gain nothing by review. Both courts held that the NCAA plan failed rule of reason analysis, and these findings are fully grounded on clearly supported factual determinations. Moreover, NCAA would have to persuade the Court that its conduct did not constitute either of the two species of group boycott found by the district court. Finally, the district court's finding of relevant market, held by the Court of Appeals to be supported by the evidence, would have to be overturned to avoid a finding of a violation of §2 of the Sherman Act.

The facts found by the lower court, which the NCAA claims not to challenge, establish beyond argument conduct which has universally been condemned to be in *per se* violation of §1 of the Sherman Act. NCAA may not escape such condemnation by mere assertion that it constitutes a beneficial integration of marketing functions, or by reference to its status as a non-profit regulatory organization, where its anticompetitive conduct is not reasonably necessary to the former, and is virtually unrelated to the latter. The conduct allowed rule of reason analysis in *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1 (1979), involved none of the pernicious aspects of NCAA's football television plan.

The observation of the Court of Appeals that a party asserting procompetitive benefits ancillary to a partial integration has the burden of proving them is fully in accord with the case authority, including *Broadcast Music*, and with common sense. Moreover, the burden of proof had no impact on the lower courts' *per se* findings; those findings were never in doubt. Further, the Court of Appeals' reference to burden of proof was not even arguably applicable to the findings concerning relevant market or rule of reason, and respondents were found to fully satisfy their burden on these issues.

The lower courts' findings as to NCAA's market power are overwhelmingly supported by the evidence; NCAA has no prospect of overcoming "the almost insurmountable burden" of demonstrating them clearly erroneous. , Both courts not only applied the proper legal and economic tests of market power, such as substitutability and submarket analysis, but also determined directly from NCAA's output and pricing behavior that NCAA has market power.

In the face of the overwhelming array of anticompetitive effects of NCAA's television plan, and particularly in view of the findings that NCAA acquired its status as exclusive marketer of college football television by exploiting its power as a regulatory authority, NCAA has no prospect of overturning the rule of reason determinations of the lower courts. Both lower courts properly rejected the proffered procompetitive benefits of NCAA's controls both legally, as not truly procompetitive, and factually, as contrary to their explicit and fully supported findings.

ARGUMENT AND AUTHORITIES

Underlying the NCAA's defense of this case, in the lower courts, in the press, and in the university community, has been the stated or unstated assertion that social disruption, in the form of the demise of amateur athletics, and perhaps even the NCAA itself, is a necessary result of the decisions of the courts below. Uncritical acceptance of this proposition has served the NCAA well over the years; it is no doubt the reason why such a classic cartel as NCAA's television plan has never been squarely challenged in the courts in the thirty years of the plan's existence. Moreover, it would appear that these same feelings heavily influenced the dissenting judge on the Court of Appeals.

This social argument fails, however, for essentially the same reason that the antitrust defenses of the NCAA fail. The "good works" of the NCAA not only are not dependent

upon, but bear no relation whatever to the anticompetitive features of the television plan. As the district court emphasized, though the supporters of the NCAA sincerely seemed to believe there was such a connection, no witness could supply any credible reason why the effectiveness of the NCAA required it to be the exclusive marketer of television rights for college football (D.C., 96a).[11] Nor has the NCAA argued to the contrary in this Court.

The courts may eventually be faced with cases involving close questions of the permissible degree of cooperation among sports competitors, which this Court may find necessary to review. This is not such a case.

Upon respondents' more complete statement of the case, it is clear that a grant of the writ of certiorari would serve no useful purpose. NCAA has petitioned for review of a hypothetical case, in two respects. First, NCAA wrongly tenders only a few of the deluge of the lower courts' holdings condemning NCAA's restraints under the antitrust laws as the determinative bases of the courts' decisions. Second, NCAA's first two questions presented are quite obviously hypothetical, since their object is to obtain a rule of reason analysis of NCAA's television controls, an analysis which NCAA has already received by both lower courts to no avail.[12] The Tenth Circuit accorded NCAA a rule of reason

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[11] The district court found significant the fact that television rights for other college sports were effectively marketed without NCAA acting as the exclusive seller (D.C., 47a-48a, 76a).

[12] Upon this basis the Solicitor General argued, in opposing NCAA's Application for Stay in this Court: "Since the court of appeals' per se characterization of the challenged conduct was not outcome-determinative, we cannot anticipate that four members of this Court would vote to grant certiorari on the first two questions presented in the application for a stay" (App., 3A). NCAA argues (Petition, n.12) that its Question 2, concerning allocation of burdens, affects the lower courts' findings under the rule of reason. This is flatly incorrect. The district court did not place the burden of proof in the rule of reason analysis on the defendant. More-

analysis in the interest of promoting litigation efficiency, given the prospect of review by this Court.[13]

The alternative holdings of the district court (either not considered or rejected by the Tenth Circuit) condemning NCAA's television controls also give sufficient cause to deny NCAA's petition for certiorari.[14] Should certiorari be granted petitioners will still fail on the merits in this Court if the Court upholds either of the bases on which the district court found a group boycott (Statement, ¶11), as respondents will urge the Court to do.

Moreover, the district court held that NCAA had illegally monopolized the market of college football television, noting that "NCAA makes no attempt to deny that if college football television is a relevant market, it is a monopolist" (D.C., 124a-125a). The Tenth Circuit found it unnecessary to reach this question (10th, 20a n.16).[15] How-

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[12] (Continued)

over, the Tenth Circuit's comment on burden of proof (10th, 11a) is clearly restricted to the *per se* evaluation of NCAA's television controls. NCAA also suggests that the difference between *per se* and rule of reason liability potentially affects the scope of relief. NCAA cites no authority, and the district court's opinion shows that relief was not predicated upon any such basis (D.C., 128a-133a).

[13] NCAA represents this explanation as a statement by the Tenth Circuit that it believed review by this Court was likely (Petition at 6). This does not seem to respondents to be consistent with either the court's express concern for litigation efficiency, or a denial of NCAA's motion for stay pending its petition for certiorari.

[14] It is well settled that "the prevailing party may defend the judgment on any ground which the law and the record permit that would not expand the relief it has been granted." *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977).

[15] The Circuit Justice, evidently misled by NCAA's assertion that the Tenth Circuit "put the monopolization holding to one side" (Application for Stay, p. 5), erroneously stated the Tenth Circuit had disagreed with the district court's monopolization holding (NCAA Appendix E, 142a).

ever, the district court's monopolization holding is clearly correct if it properly defined the market, and the Tenth Circuit upheld the district court's market definition (10th, 18a). NCAA has "an almost insurmountable burden" in overturning the findings upon which the market definition was made. *International Boxing Club* v. *United States*, 358 U.S. 242, 252 (1959).

NCAA commences its argument (Petition at 8) with the observation that the invalidation of its television controls involves much of the television industry, a great number of universities, a significant amount of money, and billions of viewers. This is all true. As to the latter, the district court stated: "Perhaps its most pernicious aspect is that under the controls, the market is not responsive to viewer preference. Every witness who testified on the matter confirmed that the consumers, the viewers of college football television, receive absolutely no benefit from the controls" (D.C., 115a).

But all of this counsels for denial of certiorari, so that all of the devastating consequences of NCAA's restraints may be expunged from the free market as soon as possible with the termination of the stay of the relief granted in this case. Each lower court decided, after careful consideration of the record in a full decision on the merits, not only to condemn the plan on multiple theories, but to refuse a stay. The NCAA has nevertheless now enjoyed two full years of its illegal plan since the district court judgment, leaving no practical recourse to respondents or the public. A grant of certiorari could add a third year of delay, even if affirmance is inevitable. The decisions below break no new legal ground. This case is important only because it eliminates such egregious restraints of free market forces, not because of the legal tenets by which this ablation was accomplished.

NCAA's argument that its "Television Plan and Contracts aid the NCAA and its members in competing against

other purveyors of entertainment" (Petition at 12) is foreclosed by, *inter alia*, this Court's holding in *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610-11 (1972), where Topco urged the division of markets between small grocery chains was justified to promote competition with large grocery chains. The Court answered: "Topco has no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy." *Id.* This also dispenses with NCAA's argument that promoting live gate attendance justifies rendering the television football market unresponsive to viewer preference.[16]

Question 1: Both lower courts found the NCAA Football Television Plan to be a horizontal combination of all the country's major football playing teams with the purpose and effect, *inter alia*, of manipulating prices by limiting output (Statement, ¶3, ¶4). The plan has therefore twice been determined to be the purest, more universally condemned form of classic price fixing, long considered *per se illegal*. NCAA argues that it is nevertheless entitled to an automatic exemption from *per se* consideration based solely on the fact that it has other, lawful functions, and that it "advanced procompetitive justifications", which justifications it contends may not be scrutinized to determine their relationship, if any, to its price fixing activity.

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[16] NCAA argues (Petition at 14 n.9) that Congress has taken live gate attendance at football games into account as the basis for legislation. That is true. The culmination of these efforts is found at 15 U.S.C. §§ 1291-1295, a specific, legislative exemption from the antitrust laws for professional sports leagues in pooling their telecasting rights. Respondents do not deny that Congress could exempt NCAA from the antitrust laws; but it has not done so, as only it can. *See Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 354-55 (1982). This Court's "adherence to the *per se* rule is grounded" partially upon "a recognition of the respective roles of the judiciary and the Congress in regulating the economy." *Id.*

There is simply no support for such an automatic exemption.[17] Self-regulatory associations with lawful, even laudable, purposes and regulations have repeatedly been held subject to *per se* rules under the Sherman Act for far more subtle interference with price mechanisms, despite advancement of procompetitive justification. *E.g.*, *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 (1982); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978);[18] *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975).

The invocation of the phrase "joint venture" does not gain entitlement to such an exemption. Joint ventures, no less than other combinations of competitors, may be subject to *per se* analysis. *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 597-98 (1957). But the arrangement here is not one "in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit", *Arizona* v. *Maricopa County Medical Society*, 457 U.S. at 356-57. It is simply a partial integration relating to marketing, and was properly analyzed by the Court of Appeals as such.

Broadcast Music, Inc. v. *CBS*, 441 U.S. 1 (1979), does not forbid *per se* analysis in joint marketing arrangements. In *Broadcast Music*, the Court held that the Court of Appeals erred in summarily condemning "literal" price fixing without considering whether the practice itself was plainly anticompetitive and "facially appear[ed] to be one which would always or almost always tend to restrict competition

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[17] Any argument that NCAA is entitled to escape *per se* scrutiny because courts have not had much experience with similar organizations is clearly contrary to this Court's decision in *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 350-51 (1982); that the *per se* rule need not be rejustified for every industry that has not been subject to significant antitrust litigation.

[18] *Professional Engineers* is described as a *per se* price fixing case in *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 647 (1980).

and decrease output . . ." 441 U.S. at 19-20. In *Broadcast Music*, there was no restriction of output, no artificial price enhancement and no restrictions on sales outside the contract — in short, no frontal assault on the free market system.[19]

The lower courts here found much more than "literal" price-fixing; they found free market forces destroyed, and price competition totally eliminated from the market (D.C., 63a-64a; 10th, 21a, 14a-15a). They held that NCAA has made itself the single seller in the market of college football television by eliminating all individual sellers (D.C., 74a; 10th, 13a-14a).[20] Both courts found the exclusivity with which NCAA controls its members' rights to injure the free market significantly (D.C., 93a, 103a; 10th, 12a, 13a-14a, 16a). Moreover, the district court found NCAA controls had the *purpose* of fixing prices and restricting output, and were therefore naked restraints (D.C., 100a, 112a, 115a). The Tenth Circuit similarly held: "The NCAA television arrangement is so fraught with anticompetitive potential that it 'appears to be one that would always or almost always tend to rstrict competition'" (10th, 9a, 15a).[21]

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[19] The Court found especially significant the fact that the individual composers had not agreed to fix prices for their individual licenses "or to use the blanket license to mask price-fixing in other markets." 441 U.S. at 23-24.

[20] The Justice Department argued, and the district court and Tenth Circuit held that NCAA had used its dominant position in regulating the intercollegiate athletic programs of its members to secure control over all of their football television broadcasting rights (App., 21B; D.C., 53a-54a, 111a-112a; 10th, 22a).

[21] NCAA also cites *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir. 1983), where the court relies upon *Broadcast Music*. However, the court in *Northrop* was careful to note that the contractual arrangement involved in the case differed "significantly from the horizontal price-fixing arrangements the Supreme Court has uniformly subjected to per se condemnation." *Id.* at 1051 n.27. This statement also

NCAA says that the Justice Department agreed with its argument that application of the *per se* rule is precluded if the NCAA is a lawful joint venture. However, the methodology advocated by the Justice Department hardly supports NCAA's position here. The Justice Department argued that there was no need to balance the procompetitive and anticompetitive effects of NCAA's controls unless NCAA demonstrated "that the procompetitive effects of its joint venture efforts are dependent on the significantly anticompetitive provisions of its television rules . . . ." (App., 18B). The Justice Department also contended that NCAA had the burden of proving "that the restraints were needed in order to sustain its procompetitive activities" (App., 26B n.19). In fact, the Justice Department recognized in its briefing before the Court of Appeals that "the distinction

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[21] (Continued)

easily distinguishes the circuit cases cited by NCAA in its Note 8. None of these cases involve price fixing, and in most of them, the courts were careful to distinguish restraints that would be *per se* illegal. *E.g., Turf Paradise, Inc.* v. *Arizona Downs*, 670 F.2d 813, 821 (9th Cir. 1982), *cert. denied*, 456 U.S. 1011 (holding "date allocation provisions" for determining use of racetrack were not "horizontal restraints" and therefore not subject to *per se* analysis under Sherman Act); *North American Soccer League* v. *NFL*, 670 F.2d 1249, 1258 (2d Cir. 1982), *cert. denied*, U.S. , 74 L.Ed.2d 639 (distinguishing agreements fixing prices or restricting customers to whom products will be sold); *Hennessey* v. *NCAA*, 564 F.2d 1136, 1149 n.14, 1150, 1152 (5th Cir. 1975) (noting that NCAA television contracts and ticket sales are a big business venture subjecting NCAA to the antitrust laws, but holding "this particular restraint [limiting coaching staffs] . . . is not a per se violation of the antitrust laws"). *Howard University* v. *NCAA*, 510 F.2d 213 (D.C. Cir. 1975), cited by NCAA, is not even an antitrust case. Other sports cases have embraced the *per se* rule under circumstances involving a self-regulatory association. *E.g., Blalock* v. *Ladies Professional Golf Ass'n*, 359 F. Supp. 1260, 1264-65 (N.D. Ga. 1973); *Robertson* v. *NBA*, 389 F.Supp. 867, 893 (S.D. N.Y. 1975).

between our analysis and that of the district court is primarily terminological" (App., 15B, n.13).[22]

Moreover, the procompetitive justifications proffered by NCAA to avoid *per se* analysis, promotion of gate attendance and athletic competitive balance, were specifically and emphatically rejected in the lower courts' factual findings, *infra* at 29.

Finally, even if NCAA were correct in its contention that the *per se* rule was improperly applied, this would clearly not warrant review, since NCAA has already obtained everything it seeks here — a rule of reason anaylsis.

Question 2: NCAA urges two points here, which will be dealt with separately. First, it argues that once an antitrust defendant asserts that otherwise *per se* unlawful restraints are ancillary to some other legitimate purpose, that defendant *eo ipso* becomes entitled to a full-scale rule of reason inquiry, without any requirement that the restraints be shown to be reasonably necessary to the legitimate purpose they are asserted to be ancillary to.

The ancillary restraints doctrine has its origin in the decision in *Addyston Pipe & Steel Co.*, 85 Fed. 271, 282-83 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). Both lower courts cited *Addyston* in discussing the doctrine that some price restraints, ancillary to other legitimate ecomonic activity of

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[22] NCAA urges that the Solicitor General has adopted its approach "to substance over form in antitrust" in amicus briefs filed in this Court in three cases cited by NCAA in its note 7. None of these cases involves a horizontal price fixing agreement, and all concern restraints involving difficult questions of antitrust law. (*E.g.*, tying arrangement purported to improve hospital services, resale price maintenance, and intra-enterprise conspiracy doctrine). The Solicitor General, in opposing NCAA's Application for Stay in this Court, said it did not believe this case worthy of review, and noted that this Court has more felicitous opportunities to clarify the proper application of *per se* rules, citing two of the three cases NCAA cites (App., 3A n.1).

the defendant, may escape *per se* antitrust condemnation (10th, 9a; D.C., 95a). As both lower courts observed, however, one indubitable requirement of the doctrine is that a restraint must be "reasonably necessary" to the purpose by reference to which the restraint is sought to be legitimized. *Addyston*, *supra*, 85 Fed. at 282-83. The only authority NCAA cites in support of discarding this method of analysis is *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1 (1979). But *Broadcast Music* represents what is probably the strongest single obstacle for NCAA in its contention.

In carving out a limited exception from the *per se* rule for the nonexclusive cooperative marketing of blanket licenses for musical compositions, the Court in *Broadcast Music* found that "[a] middleman with a blanket license was an *obvious necessity* if the thousands of individual negotiations, a virtual impossibility, were to be avoided." (Emphasis supplied) 441 U.S. at 20. The Court said, in discussing the relationship between the Sherman Act and the Copyright Act:

> "[W]e would not expect that any market arrangements *reasonably necessary* to effectuate the rights that are granted [under the Copyright Act] would be deemed a per se violation of the Sherman Act." (Emphasis supplied) 441 U.S. at 19.

The Court concluded its analysis of the relationship between the blanket license and the market efficiencies it promoted this way:

> "Moreover, a bulk license of some type is a *necessary consequence* of the integration *necessary* to achieve these efficiencies, and a *necessary consequence* of an aggregate license is that its price must be established." (Emphasis supplied) 441 U.S. at 21.[23]

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[23] In *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 356 n.33, the Court rejected an attempted comparison to *Broadcast Music*, observing that price setting of the doctors was not a "necessary conse-

It is surely sensible to permit otherwise *per se* illegal behavior, as ancillary to other objectives, only where it is needed to fulfill those objectives. The *per se* rule cannot be avoided by showing that if a rule of reason analysis were used, the restraint would not be held unlawful. Besides being a nonsequitur, such a principle would conflict with the well established principle for applying the *per se* rule, recently reaffirmed in *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 351 (1982), that: "The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some."

Second, NCAA argues that the burden of proof was improperly placed upon it. NCAA's assertion that the burden

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[23] (Continued)

quence" of prepaid health insurance plans. The Solicitor General had argued (amicus curiae brief at 20) that once it is shown defendants have fixed prices, the assessment of any justification for doing so "should be limited to ascertaining whether the proponents of the agreements have identified significant procompetitive effects achieved through integration of productive capacity that are unattainable in the absence of the agreement. . . . In the absence of such a necessary relationship to integrated productive activity, however, an agreement among competitors fixing prices properly is deemed a naked restraint with no purpose other than elimination of rivalry." Courts have applied similar methodology in sports boycott cases, often applying the *per se* rule. *See Denver Rockets* v. *All-Pro Management, Inc.*, 325 F.Supp. 1049, 1064-65 (D.Cal. 1971), injunction reinstated sub nom., *Haywood* v. *NBA*, 401 U.S. 1204 (1971); *Linseman* v. *World Hockey Ass'n*, 439 F.Supp. 1315, 1321 (D. Conn. 1977); *Brenner* v. *World Boxing Council*, 675 F.2d 445, 455 (2d Cir. 1982), *cert. denied*, U.S. , 74 L.Ed.2d 76; *Cf., Gunter Harz Sports, Inc.* v. *United States Tennis Ass'n*, 511 F.Supp. 1103, 1116 (D. Neb. 1981), *aff'd*, 665 F.2d 222 (9th Cir. 1981). *See also* Sullivan, ANTITRUST §77, pp. 208-209 (1977) (applying two part test to avoid *per se* rule: (a) Price restraint must arise inevitably from the integration; (b) Arrangement must not dampen price competition market-wide by ending price competition between participants).

of proof "never shift[s] to the defendant" in an antitrust case (Petition at 16) is confusing at best, and inaccurate at worst. Many affirmative defenses exist in antitrust law where defendant has the burden of proof. *See, e.g.*, 10 Von Kalinowski, *Antitrust Laws and Trade Regulations*, §109.01 *et seq.* Unquestionably, entitlement to relief from *per se* scrutiny for restraints which ordinarily fall within *per se* rules is a defense, and the authorities accordingly place the burden of proof on the antitrust defendant seeking such relief.[24] In *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 693 (1978), this Court described defendant's argument that its procompetitive justification should relieve it from *per se* scrutiny as an "affirmative defense".

Contrary to NCAA's assertion (Petition at 15, n.10), the burden of proof question does not affect all of the findings of the trial court. The Tenth Circuit said the burden of proving the effectiveness and necessity of NCAA's restraints was on the NCAA "when considering whether to apply *per se* or rule of reason analysis to admitted price restraints that the defendant attempts to justify as properly ancillary to a legitimate integration" (10th, 11a n.9).

The burden of proof issue, even if erroneously decided, would hardly seem to merit review in this case. The burden of proof is also often denominated the "risk of non-persuasion", and is important only where a court is in doubt, being unable to decide whether a factual proposition is true or false. *E.g.*, McCormick, *Evidence* §336, p. 784 (1972); 9 Wigmore, *Evidence* §2485, pp. 285-87 (1981). It cannot realistically be said that either court below re-

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[24] The courts in the sports cases cited in note 23, *supra*, required defendant to prove entitlement to exception relief from otherwise applicable *per se* rules. The Justice Department as amicus curiae in the court below also contended the burden of proof was on NCAA to show its restraints were necessary to sustain its procompetitive effects (App., 26B n.19).

served any doubt as to their factual conclusions. To the contrary, both courts vigorously and affirmatively repudiated NCAA's contentions as palpably false.[25]

NCAA also asserts (Petition at 15, n.10) that on some issues the only evidence was that produced by NCAA, without identifying any such issues so that it can be seen whether they have legal significance. In any event, a party's burden of proof may be satisfied by evidence introduced by its adversary.[26] Notably, the district court reached many of its findings based upon testimony of NCAA witnesses (*E.g.*, D.C., 57a, 73a, 75a, 90a-91a, 120a-121a).

Question 3: Sustaining of the lower courts' market power finding will be fatal to the NCAA not only on the rule of reason inquiry under §1 of the Sherman Act, but also on the district court's monopolization finding under §2. The NCAA has conceded that its *only* defense to §2 is that the relevant market was defined improperly (D.C., 124a-125a; 10th, 20a n.16). The Tenth Circuit held the district court's definition of the relevant market "has adequate

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[25] The district court made numerous affirmative findings of fact, showing that it was not in any doubt whatsoever in reaching its conclusions. For example, it affirmatively found that NCAA's controls were not intended to protect gate attendance (D.C., 69a-70a), that NCAA's non-commercial regulations were sufficient for furthering athletic competitive balance (D.C., 70a, 110a), that the controls are much more far reaching than necessary to achieve competitive balance, and that any contribution to competitive balance "is overwhelmed by the violence which the controls inflict on the free market economy" (DC., 109a). Moreover, the court concluded affirmatively that the *purpose* of NCAA's controls is to enhance prices by fixing them and restricting output (D.C., 112a). Similarly, the Tenth Circuit affirmatively held: "The restraints contained in the television plan do not increase the efficiency of the rule making integration and are broader than necessary to achieve asserted procompetitive goals" (10th, 11a).

[26] *E.g.*, *Van Sant* v. *American Express Co.*, 169 F.2d 355, 365 (3d Cir. 1947); *Louis Dreyfus Corp.* v. *United States*, 401 F.Supp. 919 (S.D.N.Y. 1975).

evidentiary support in the record" (10th, 18a). To obtain a reversal in this Court, the NCAA faces the "almost insurmountable burden" of upsetting these findings. *International Boxing Club* v. *United States*, 358 U.S. 242, 252 (1959).

Both lower courts devoted considerable attention to and made extensive findings in defining the relevant market (Statement, ¶15). NCAA has again ignored these findings. NCAA says (Petition at 19) that the lower courts based their definition of the relevant market "essentially" on the grounds that (1) for many *viewers*, there is no substitute for college football and (2) advertisers pay more per viewer of college football television than they pay for average television viewers. This is fundamentally incorrect. The courts properly analyzed the market from the standpoint of the *networks*, the purchasers of broadcast rights. The courts found that for the networks, there is no substitute for college football, that they need college football to offer on Saturday afternoon, that CBS frequently "went dark" opposite ABC on Saturday afternoons when ABC had exclusive rights to televise college football, and that ABC was even willing to suffer a net loss to televise college football for the intangible benefits it received from being affiliated with the sport (Statement, ¶15). Yet NCAA claims that it challenges only "the principles used by the lower courts, not the facts they found" (Petition at 20-21, n.14).[27]

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[27] NCAA, holding out its distilled version of the courts' holdings as dispositive, asserts (Petition at 20-21, n.14) that it does not deny that many viewers find college football unique or that networks "feel compelled to show college games." NCAA says, however, that "[t]he question is wholly legal: what inferences should be drawn from the undisputed facts?" The "clearly erroneous" standard of review, Rule 52(a), Fed.R.Civ.P., cannot be circumvented so easily. NCAA's assertion that the parties are in agreement on the facts is correct only in the sense that the parties did not attack each other's raw statistical data. Even in this respect the experts drew widely divergent conclusions from the data. As

The district court carefully analyzed the unique or special characteristics of the industry, the buyers, the sellers, and the product itself (D.C., 71a-75a). Both lower courts also fully analyzed substitutability and cross-elasticity of demand (D.C., 122a-123a, 76a-77a; 10th, 18a-19a), as had the parties' experts. And both courts concluded that by every test the NCAA has market power.

The NCAA asserts that if a court can assess directly whether defendant can affect price by reducing output, this is "so much the better" to determine market power (Petition at 21). The NCAA then proceeds to theorize that it has no such power. However, the district court made explicit and extensive findings on this precise issue, analyzing NCAA's output and price, and concluding that market power was directly demonstrated (D.C., 121a-124a). And it was this type of analysis that led the Court of Appeals to conclude that the NCAA possessed market power even if the district court had defined the market too narrowly (10th, 20a). These findings would surely present an insurmountable burden to NCAA on review by this Court.

The district court also held: "It strains credulity to suggest that broadcast programming does not consist of submarkets, and the Court finds that the evidence does not yield that result." (D.C., 76a). The court's analysis accords with this Court's decision in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962).[28] The decision in *Brown*

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[27] (Continued)

the district court said, "[t]he issue of relevant market was hotly contested at trial." (D.C., 116a). But in any event, the inference to be drawn from "the undisputed facts" is clearly factual itself. The "clearly erroneous" standard therefore applies. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982); *United States* v. *United States Gypsum Company*, 333 U.S. 364, 394 (1948).

[28] NCAA argues that the methodology used by the lower courts creates a conflict between the circuits, citing a number of cases for the proposition that the existence of some committed customers and distinctive prod-

Shoe was merely an extension of this Court's previous decision, more significant in the context of this case, in *International Boxing Club* v. *United States*, 358 U.S. 242 (1959). In *International Boxing*, this Court affirmed a trial court judgment that there was a relevant market "in the promotion, broadcasting, and televising of professional world championship boxing contests", *id.* at 244, because it was "the 'cream' of the boxing business." *Id.* at 252. One factor considered was the comparison of revenue received for championship, vis-a-vis nonchampionship boxing contests, *id.* at 250. The Court, noting that "appellants have an almost insurmountable burden" in overturning the findings of the district court, *id.* at 252, concluded that those findings were not "clearly erroneous" in defining the relevant market. *Id.* at 251.

Question 4: As to the rule of reason inquiry, NCAA again has distorted and trivialized the lower courts' holdings. The NCAA suggests that the Court of Appeals' holding on the rule of reason is based solely upon NCAA's elimination of game by game negotiation for broadcast rights.

Though this was one element of consideration before both lower courts, the courts fully considered the character of the contracts and surrounding circumstances to conclude that the NCAA plan was unlawful (Statement, ¶¶ 3, 4,

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[28] (Continued)

ucts do not identify a market. All of the cases NCAA cites recognize the legitimacy of defining a market according to the uniqueness of a product. Indeed, in all but *Reiner* v. *General Motors Corp.*, 511 F.Supp. 1167 (S.D.N.Y. 1981), *aff'd*, 671 F.2d 91 (2d Cir. 1982), *cert. denied*, ___ U.S. ___, 74 L.Ed.2d 112, this Court's decision in *Brown Shoe*, *supra*, was specifically considered for its submarket principles. Submarket principles have been steadfastly adhered to by the courts of appeals, in sports as well as other cases. *E.g.*, *North American Soccer League* v. *NFL*, 670 F.2d 1249, 1260 (2d Cir. 1982), *cert. denied*, ___ U.S. ___, 74 L.Ed.2d 400; *Twin City SportsService, Inc.* v. *Charles O. Finley & Co.*, 676 F.2d 1291, 1299-1300 (9th Cir. 1982). No conflict exists between the circuits on this issue.

13 and 14). Central to this holding was the finding that NCAA, in becoming the exclusive seller of college football television rights through its single package, had "used its dominance in the regulation of intercollegiate athletics to obtain control of broadcast rights to intercollegiate football" (10th, 22a). The NCAA ignores this finding in extolling the level of competition for purchase of its package.

But this finding alone is sufficient to condemn the plan. As both courts observed, NCAA never proffered any justification for its exclusive control over the television rights. The Justice Department urged as *amicus curiae* to the Tenth Circuit: "In particular we believe that the NCAA has failed to explain the necessity of its assuming the role of exclusive selling agent for the colleges. . . ." (App., 23B-24B n.17).[29]

The lower courts listed numerous other anticompetitive effects on the free market that were, in the courts' view, beyond justification by the NCAA's claimed benefits from its restraints (Statement, ¶¶ 13, 14). The Justice Department also listed the numerous adverse effects of NCAA's television controls on the free market (App., 19B-20B.)[30]

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[29] This is also the explanation for why "ABC appeared as amicus curiae to defend the contracts, while CBS and Turner supported the NCAA's request for a stay in the Tenth Circuit" (Petition at 23). ABC, CBS and Turner are happy to have exclusive rights, under the present contracts, to televise college football. On the other hand, the Association of Independent Television Stations, Inc., representing 84 television broadcast stations unaffiliated with any network, filed an amicus brief in the Tenth Circuit supporting the district court on the ground, *inter alia*, that the NCAA television plan "restricts output by foreclosing in most instances the purchase by other broadcasters of rights to televise a game not chosen by ABC or CBS, even if all schools involved are willing to have that game broadcast." (pp. 10-11).

[30] One of the points made by the Justice Department is that the NCAA controls "artificially suppressed product diversity, by restricting the opportunity for regional or local broadcasts of individual college games of local interest, and by limiting the number of appearances on television by in-

Moreover, each of the NCAA's proffered procompetitive benefits was rejected in specific findings of fact by the lower courts (Statement, ¶¶ 5-10). The NCAA has disregarded these findings. For example, NCAA says that its single most important procompetitive justification is that "[t]he [NCAA] plan and contracts spread national and regional TV appearances among more teams than would be the case in their absence" (Petition at 14). The district court found that although fewer different teams would appear on the networks, "more games involving more teams would be telecast by local and regional stations" (D.C., 114a) and the total number of college football games televised would increase (D.C., 66a, 118a). The Tenth Circuit relied upon these findings in concluding that the *elimination* of NCAA's television plan "would have the effect of equalizing revenues" (10th, 21a). Both lower courts also found NCAA's gate attendance argument unsupported by the evidence (D.C., 107a-109a; 10th, 10a). And the NCAA's interbrand intrabrand argument is negated by the market findings of the lower courts, as the Tenth Circuit properly observed (10th, 21a-22a).

Finally, the NCAA cannot challenge the findings of the lower courts which demonstrate beyond argument that the role of the antitrust laws as a "consumer welfare prescription"[31] can only be served by dismantling the television controls. More games will be shown in a free market; particularly more game viewers wish to see, and fewer they do not. NCAA witnesses not only admitted this, but stated it as their primary objection to the free market. Too many

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[30] (Continued)

dividual members. According to testimony these restrictions have reduced the opportunity for many smaller schools to appear on television (either locally or regionally), . . . and have reduced the opportunities for the major football schools to appear (either on national or regional broadcasts) as frequently as they would otherwise be able" (App., 20B).

[31] *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979).

games would be shown, they complained, driving down the price the schools could command for their network contracts. "Every witness who testified on the matter confirmed that the consumers, the viewers of college football television, receive absolutely no benefit from the controls" (D.C., 115a). A better argument for prompt institution of the free market cannot be imagined.[32]

CONCLUSION

The NCAA has presented a hypothetical case, on hypothetical facts with questions presented which, even if decided as NCAA urges, would not change the result. Even the hypothetical case would not be deserving of review. The actual case certainly is not. The writ of certiorari should be denied.

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[32] The cases cited by NCAA in its attempt to create a conflict between the Circuits on the rule of reason holding (Petition at 22-23 n.16) are entirely inapposite to this case. Their substantial holdings follow parenthetically. *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961) (approving long-term contract for sale of coal by single coal producer to single electric utility); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964) (prohibiting merger of two independent viable gas producers because "[t]he presence of two or more suppliers gives buyers a choice." *Id.* at 661); *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974) (permitting merger between coal producers, where one had exiguous reserves and would not be able to effectively compete for long-term contracts between single producers and purchasers); *Fleer Corp.* v. *Topps Chewing Gum, Inc.*, 658 F.2d 139 (3d Cir. 1981), *cert. denied*, 455 U.S. 1019 (holding lawful labor union's renegotiation of major league baseball players' individual contracts for sale of publicity rights for baseball cards — exclusively only when used in combination with bubble gum — not when combined with nonconfectionary goods); *Omega Satellite Products Co.* v. *City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982) (opining that city's elected representatives could grant exclusive franchise to cable company which is natural monopolist anyway; distinguishing as unlawful case where competing cable companies agree not to invade each other's territory. *Id.* at 127).

Respectfully submitted,

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September, 1983

APPENDICES

APPENDIX A

No. A-24

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, APPLICANT

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, ET AL.

ON APPLICATION FOR A STAY OF THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND FOR A STAY OF THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE CONCERNING THE APPLICATION FOR STAY

This memorandum is submitted in response to Justice White's invitation to the Solicitor General to express the views of the United States concerning the application for a stay. The views of the United States on the merits of this case are set out in detail in an *amicus curiae* brief filed in the court of appeals, a copy of which is attached hereto. In this memorandum we will address only the issues relevant to the stay application.

1. This case concerns the legality, under the antitrust laws, of a plan adopted by applicant National Collegiate Athletic Association ("NCAA"). That plan has the prac-

tical effect of reserving to the NCAA the exclusive authority to sell television rights for college football games played by its member schools. Respondents the University of Oklahoma and the University of Georgia, two members of the NCAA, claim that the NCAA's football television plan unreasonably denies individual member schools the opportunity to sell the television rights to their football games, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 & 2; respondents have sought injunctive relief against further implementation of the NCAA's plan. After a bench trial, the district court concluded that the plan did in fact violate Sections 1 and 2 of the Sherman Act and awarded respondents injunctive relief. The court of appeals agreed that the plan violated Section 1, did not reach the question of whether it violated Section 2, and remanded the case to the district court to reconsider the scope of its injunction in light of the views expressed in the court of appeals' opinion. After the court of appeals denied a motion to stay its mandate, the NCAA applied to this Court for a stay pending the filing of a petition for certiorari.

2. A stay of the mandate of a lower court will be granted only on an "extraordinary showing." *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163-164 (1923). At the very least, the applicant must show both that there is "a reasonable probability that four Members of the Court will consider the issue sufficiently meritorious to grant certiorari," *Graves* v. *Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, Circuit Justice), and that there is a "likelihood that irreparable harm will result if th[e] decision [below] is not stayed." *Times-Picayune Publishing Co.* v. *Schalingkamp*, 419 U.S. 1301, 1305 (1974) (Powell, Circuit Justice). See *Whalen* v. *Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, Circuit Justice). For the reasons indicated below, the United States is of the view that it is not probable that certiorari will be granted. The United States, however, is not in a position to evaluate the equitable balance between the parties with respect to any stay, nor qualified to speculate on whether

or how the district court will narrow its injunction, or the manner in which the parties might be affected by any such modification. Consequently, the United States takes no position on those aspects of the stay application.

3. The first two issues that the NCAA proposes to present for review on certiorari (Application at 2, 13-18) arise from the court of appeals' holding that the NCAA's television plan is a per se violation of Section 1. However, while the court explicitly ruled that "the television plan constitutes *per se* illegal price fixing" (Appendix A at 15a), it reached that conclusion only after a lengthy analysis of the alleged justifications for the plan (*id.* at 6a-15a) and then went on to hold, in the alternative, that the NCAA's plan violated Section 1 even when evaluated under the rule of reason (*id.* at 15a-22a). In its *amicus* brief in the court of appeals, the United States asserted that the challenged conduct should not be deemed per se unlawful (pp. 12-20). We believe that it is a contradiction in terms to do what the court of appeals did here — to designate conduct as "per se" illegal only after a lengthy judicial inquiry into its potential competitive detriments and benefits; in our opinion, such an improper analysis can lead to incorrect results. See, *e.g.*, *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 19-20 n.33 (1979). Nevertheless, any error in the court of appeals' "per se" characterization was rendered moot by the fact that the court proceeded to analyze the challenged conduct under the rule of reason and rendered an alternative holding that, in our view, correctly concluded that the NCAA's conduct violated the Sherman Act. Since the court of appeals' per se characterization of the challenged conduct was not outcome-determinative, we cannot anticipate that four Members of this Court would vote to grant certiorari on the first two questions presented in the application for a stay.[1]

[1] Although the United States believes that the proper use of per se analysis is extremely important to antitrust enforcement, this Court has other opportunities to clarify the law in that respect. *See, e.g., Monsanto Co.* v.

The third issue presented by the NCAA — whether the court of appeals too narrowly defined the relevant product market (Application 2, 18-20) — does not merit plenary consideration by this Court. The court of appeals' relevant product market finding, even if erroneous, is fact-laden, creates no conflict in the circuits, and possesses little precedential significance. Even if the court of appeals' conclusion that NCAA football is "a unique type of Saturday afternoon programming" that constitutes a relevant product market in which the NCAA has market power (Appendix A at 18a-20a) is unfounded, any such error would not mean that its ultimate rule of reason conclusion was incorrect. As we indicated to the court of appeals in our *amicus* brief (pages 28-30), the United States believes that the court should have focused on the NCAA's regulatory power over colleges that want to participate in a full program of intercollegiate athletics, rather than on its power over television advertisers. The NCAA possesses very substantial regulatory power over those intercollegiate events, including football, in which its members take part. In these circumstances, the lower courts correctly determined that it utilized that power to deprive respondents of their ability to sell — and other purchasers of the ability to buy — college football television programs other than the package sold by the NCAA. And, in our view, although many of the justifications offered by the NCAA merited careful consideration by the court, on balance the NCAA failed to justify the restrictions that it has placed on the ability of its member schools to arrange for the telecast of their own football games.

The fourth issue presented by the NCAA — whether college sports television packages arranged by groups of

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[1] (Continued)

Spray-Rite Service Corp., No. 82-914, *cert. granted*, February 28, 1983; and *Jefferson Parish Hospital* v. *Hyde*, No. 82-1031, *cert. granted*, March 7, 1983.

schools are necessarily unlawful (Application 2, 20-22) — is not presented by this case. Contrary to applicant's assertion (*id.* at 20-22), the court of appeals' opinion did not broadly prohibit all joint sales of program packages; rather, the decision focussed solely upon the NCAA's nationwide plan that prohibits individual program sales by its members. The circumstances under which particular television packages of lesser scope or exclusivity may be subject to antitrust scrutiny are not implicated by this decision.

In summary, the United States is not in a position to determine the relative harm or the balance of equities between the parties with respect to a stay. We state only our view that it is not probable that certiorari will be granted to review the issues the NCAA proposes to present. While the United States disagrees with some aspects of the opinion of the court of appeals, we believe its judgment was correct, and we are cognizant that this Court traditionally exercises its certiorari jurisdiction to review judgments rather than to revise opinions.

Respectfully submitted,

REX E. LEE
Solicitor General

JULY 1983

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 82-2148

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION,
Plaintiffs-Appellees,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF FOR THE UNITED STATES OF AMERICA
AS AMICUS CURIAE

[Table of Contents and Authorities omitted here]

INTEREST OF THE UNITED STATES

The United States has primary responsibility for the preservation and promotion of competition through enforcement of the federal antitrust laws. Consequently, it has a substantial interest in ensuring that those laws are interpreted and applied in a manner that promotes competition and consumer welfare.

STATEMENT OF ISSUES

The United States will address the following issues in this *amicus* brief: [1]

[1] The United States will not address the question whether the NCAA violated section 2 of the Sherman Act, 15 U.S.C. 2, as the district court found.

1. Whether the restrictions imposed by the National Collegiate Athletic Association ("NCAA") on its members with respect to the telecasting of football games and the television contracts entered into by the NCAA pursuant to its restrictive television policies constitute the type of price fixing or group boycott activities which have been characterized by the courts as per se violations of section 1 of the Sherman Act, 15 U.S.C. 1.

2. Whether the evidence supports the district court's conclusion that the NCAA's television policy, which has the practical effect of arrogating to it the exclusive right to sell television rights to member football games and thereby depriving member colleges of the right to compete in the sale of television rights, constitutes an unreasonable restraint of trade in violation of section 1 of the Sherman Act, 15 U.S.C. 1, when judged under the rule of reason.

STATEMENT OF THE CASE

I. *PROCEEDINGS BELOW*

The University of Oklahoma and the University of Georgia, plaintiffs in this action, brought suit in the United States District Court for the Western District of Oklahoma against the NCAA, alleging that the latter's football television contract negotiated with the television networks,[2] and the restrictions imposed by the NCAA on the authority of its members to seek independent telecasting of their games, violated sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2.[3] After trial to the bench in June 1982, the dis-

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[2] From 1965 to 1981, ABC was the only network to obtain broadcasting rights for college football television. New contracts negotiated for 1982 through 1985 grant CBS as well as ABC the right to broadcast college games. In addition, Turner Broadcasting System, which promotes a cable network, contracted to telecast college games. Together these three entities will be referred to herein as "the networks."

[3] Section 1 of the Sherman Act provides: "Every contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several

trict court (Hon. Juan G. Burciaga of the District of New Mexico, sitting by designation) ruled for the plaintiffs in an opinion and judgment rendered on September 15, 1982. The court held that the controls exercised by the NCAA constituted both an agreement among competitors to fix prices and restrict output and a group boycott, which were illegal per se under section 1 of the Sherman Act. Alternatively, it reviewed the NCAA's conduct under the rule of reason and determined that it violated the antitrust laws under that test. Finally, the court held that the NCAA monopolized the market for college football television in violation of section 2. The court therefore voided the television contracts between the NCAA and the networks and enjoined the NCAA from prohibiting its members from negotiating contracts for the telecasting of games in which they participate. The NCAA then appealed to this Court, which granted a stay of the district court's mandate pending appeal.

II. *STATEMENT OF FACTS*

Defendant NCAA is a private non-profit association, whose membership consists of approximately nine hundred colleges and universities,[4] which was established in 1905 for the purpose of regulating the conduct of intercollegiate athletic contests. The NCAA regulates a number of aspects of college sports, with the express purposes of organizing the play, protecting the amateur status of col-

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[3] (Continued)

States, or with foreign nations, is declared to be illegal." Section 2 provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ."

[4] Members of the NCAA are placed in one of three divisions depending upon the size of their athletic programs. Of its members, approximately five hundred field football teams, and 187 of the football schools are in Division I.

lege athletics, and avoiding what it viewed as excesses that were inconsistent with its concept of athletics performed by "scholar-athletes." Over the years the NCAA enacted numerous rules — such as playing rules, restrictions on the number of scholarships and on the financial recruitment incentives schools may award, limitations on coaching staffs and training seasons, and standards for academic eligibility — that were directly related to the attainment of these objectives.

In the early 1950s, the NCAA expanded its original role of establishing rules for playing football and enacted a series of stringent restrictions on the telecasting of college football games. This expansion of its regulatory role was a response to the concern expressed by some members that the increase of uncontrolled telecasting would reduce public attendance at live games. Thus the NCAA began regulating the marketing aspects of college sports that were at best indirectly related to the world of "scholar athletes" and instead had a direct impact upon the financial relationship of schools with the media and, through them, with consumers and advertisers.[5]

The NCAA, by its television restrictions, as a practical matter has arrogated to itself the exclusive authority to sell television rights for college football games, and has prohibited individual schools from negotiating with television or cable outlets other than those chosen by the NCAA and the

[5] Until 1977, the NCAA implemented these restrictions through a Plan that was developed by its Football Television Committee in response to questionnaires completed by the membership. After 1977, the membership, rather than approving a fixed plan, voted on Principles of Negotiation, which provided a general, though not binding, basis for negotiation between the NCAA and the television networks. Until recently, the NCAA negotiated annual contracts with a single network. In 1977, however, it entered into a four-year contract with a single network (ABC), and in 1981 it entered into four-year contracts with two networks and a cable telecasting system.

contracting network.[6] In addition, the controls limit the number of times specific teams may appear on television, and they set a minimum number of games and a minimum number of regional and nationwide broadcasts the networks must present during a season. Finally, they require the networks to present a fixed minimum number of different teams during the course of a season. Dist. ct. op. at 24.[7]

The prohibitions against independent negotiations by any member or group of members of the NCAA are reinforced by the threatened use of various sanctions by that organization. A violator may be prohibited from appearing on television in a football contest with any other NCAA member, which, the district court found, effectively eliminates the possibility of appearing on television at all. Dist. ct. op. at 28-29, 63-65. A violator also may be banned from appearing in NCAA-sponsored events and playoffs in other sports and ultimately be expelled from the organization. Tr. 15-16, 54, 115. Because of the NCAA's dominant regulatory position in the world of college sports, such sanctions would devastate a school's athletic programs, make it impossible to recruit quality athletes, and reduce the in-

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[6] "Exception telecasts" for individual games are permitted under rigidly limited conditions. See *Board of Regents* v. *NCAA*, slip op. at 6, 19 (Civ. No. 81-1209-BU) (W.D. Okla. 1982) [hereinafter cited as "Dist ct. op."]. Very few games each year actually are telecast under this exception.

[7] In return for the exclusive right to broadcast college football games, the networks agree to pay an annual "minimum aggregate fee," which has ranged from $29 million in 1978 to a planned $72 million in 1985. Dist. ct. op. at 18-18a. A small portion of the fee is earmarked for the broadcast of playoff games and Division II and III telecasts, and the NCAA itself retains eight per cent of the remainder. The remaining amount is divided among the Division I teams that appear on television during the year. The sum paid to each team is "recommended" by the NCAA, and the NCAA's practice has been to recommend that all nationally-televised teams receive equal amounts, and similarly that participants in all regionally-televised games be paid the same amount. The NCAA's recommendations have been uniformly adopted by the networks.

come and prestige resulting from participation in intercollegiate athletic events. Dist. ct. op. at 14.

In the 1970s, discontent with the NCAA football regulations caused many of the major football colleges, including plaintiffs, to form the College Football Association ("CFA"), to lobby and promote their interests within the NCAA. The CFA then developed an independent television plan and negotiated a contract with the NBC network. In response, the NCAA interpreted its by-laws to prohibit such independent actions and threatened sanctions against the CFA members. Dist. ct. op. at 8-12. The CFA then applied to the district court for a temporary injunction, which was granted and continues in effect, prohibiting the NCAA from attempting to interfere with the former's negotiations with NBC. Nonetheless, the CFA's attempts to develop an independent television contract failed, in large part, the district court found, because of "the threat of NCAA sanctions, in spite of the temporary equitable relief." *Id.* at 12. Members of the CFA continued to work within the NCAA by presenting resolutions at the NCAA's conventions calling for the easing of the television restrictions. But, although some restructuring of the football divisions was accepted, the full membership defeated proposals to reduce the organization's control over television.[8] And in January 1982 the NCAA amended its by-laws to state explicitly that it "shall control all forms of televising of the intercollegiate football games of member institutions . . . ." *Id.* at 9-10, 13-14. Plaintiffs then brought this suit.

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[8] A substantial majority of the NCAA's membership consists of schools with no football program or with small programs appropriate for Divisions II and III. Thus, the interests of the major football schools (*i.e.*, those in Division I-A and the CFA), when at odds with those of the remainder of the NCAA membership, as in this case, can be easily and consistently defeated when considered within the confines of the NCAA. *Cf.* Dist. Ct. op. 12-13.

SUMMARY OF ARGUMENT

The United States submits that the district court correctly determined that the NCAA's restrictive television policies violated Section 1 of the Sherman Act, and that the injunctive relief ordered was an appropriate remedy of the violation.

We believe, however, that the district court erred in concluding that the challenged conduct constitutes either price fixing or a group boycott that is per se unlawful under Section 1 of the Sherman Act. Conduct is deemed per se unlawful under the Sherman Act only where judicial experience indicates that the practices are of a type so likely to restrain competition that inquiry into the likely competitive effects of the practice in particular cases is unnecessary. The NCAA's television restraints, viewed literally, do not take the form of the typical price fix or group boycott. They are not naked restraints, manifestly unrelated to any legitimate cooperative endeavor. Rather, the NCAA, which engages in a host of rulemaking and promotional activities that are conceded to be desirable, if not necessary, for the organization and survival of amateur intercollegiate athletics, argues that the challenged television restrictions are necessary for the conduct of its rulemaking activities. Moreover, it argues that the television restrictions are procompetitive in effect because they make possible the provision of televised football to consumers. While closer scrutiny properly results in a rejection of the NCAA's contentions, they are not so plainly devoid of merit as to warrant dismissal without inquiry into the purpose or competitive effects of the challenged practices. And per se rules are appropriate only where experience indicates that no inquiry into competitive purpose or effect is warranted.

The plaintiffs demonstrated that the NCAA's television restraints have anticompetitive effects. Consequently, under *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1 (1979), the next step in the proper analysis is to scrutinize the television

restrictions under the rule of reason to determine whether the evidence proffered by the NCAA demonstrates that the attainment of the procompetitive goals of the joint venture are dependent on the television restrictions. Only if the NCAA meets that burden need the court proceed to balance the anticompetitive effects of the restraints against the procompetitive benefits they make possible. Here, the NCAA offered justifications allegedly showing the importance of the television restrictions for the continued efficacy of its procompetitive functions. But, after reviewing the evidence, the district court correctly rejected those justifications, either because they were not of a type cognizable under the antitrust laws, *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978), or because insufficient evidence was proffered by the NCAA to demonstrate that the productive activities of the joint venture were, in fact, dependent on the competitive restrictions. The United States submits that the district court's conclusion based on the evidence was correct; in any event, it certainly was not clearly erroneous. The NCAA's restrictions, therefore, were properly found to be an unreasonable restraint of trade in violation of section 1 of the Sherman Act. We also believe that the injunction imposed by the district court, when interpreted in light of the circumstances of the case, constituted a permissible exercise of the district court's equity powers in fashioning relief.

ARGUMENT

Three fundamental elements must be proven before a violation of Section 1 of the Sherman Act is made out: the presence of an agreement, an effect on interstate commerce, and an unreasonable restraint of trade. The presence of the first two elements is not at issue in this case. Thus, the focus of the litigation has been on the issue of whether the agreement among the NCAA's membership constitutes an unreasonable restraint of trade. After a full trial, the district court held that the NCAA's controls constituted per

se violations of Section 1 of the Sherman Act, Dist. ct. op. at 48-67, and alternatively that they violated the Act under the detailed scrutiny called for by the "rule of reason." *Id.* at 68-79. The United States submits that the conduct challenged in the present case is not of the type to which the per se rule is properly applicable on the basis of present judicial experience, and hence that the district court's finding of a per se violation of the Sherman Act was erroneous. We believe, however, that the evidence is sufficient to support the district court's alternative conclusion that under the rule of reason the NCAA's television broadcast restrictions violate the Act, and that as a consequence an injunction against the enforcement of those restrictions against member institutions was appropriate.

I. THE NCAA'S TELEVISION BROADCAST RESTRICTIONS ARE NOT THE TYPE OF CONDUCT THAT A COURT MAY FIND TO BE A PER SE VIOLATION OF SECTION 1 OF THE SHERMAN ACT, *I.E.*, THEY MAY NOT BE FOUND ILLEGAL WITHOUT AT LEAST A BRIEF EXAMINATION OF THEIR POTENTIAL COMPETITIVE EFFECTS.

A. *The NCAA's Conduct Does Not Constitute Per Se Unreasonable Price Fixing*

The language of Section 1 of the Sherman Act prohibits literally every agreement in restraint of trade. From the earliest cases, however, the Supreme Court recognized that Congress could not have intended that the fullest scope be given to this language, for every business contract or agreement does, to some extent, restrain trade. See, *e.g.*, *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911); *United States* v. *Joint Traffic Ass'n*, 171 U.S. 505, 568 (1898).[9] To

[9] [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is

determine whether a particular agreement violates the Act, therefore, the Court developed a "rule of reason" analysis, according to which an agreement is held to be unlawful only after it is found "under all the circumstances of the case [to] impose [] an unreasonable restraint on competition." *Arizona* v. *Maricopa County Medical Society*, 102 S.Ct. 2466, 2472 (1982) (footnote omitted); *Standard Oil*, *supra*, at 60, 63-65.

Over the years, however, judicial experience has revealed that certain types of agreements consistently are found under the rule of reason to be unreasonably restrictive. To spare the courts and litigating parties the expenditure of resources required for full rule of reason analysis in each case, and to encourage business certainty, the courts conclusively presume that those restraints are per se unreasonable and violative of the Sherman Act.[10] Once the practice in a particular case is identified within a category

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[9] (Continued)

whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

Board of Trade of the City of Chicago v. *United States*, 246 U.S. 231, 238 (1918).

[10] [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable — an inquiry so often wholly fruitless when undertaken.

Northern Pacific R. Co. v. *United States*, 356 U.S. 1, 5 (1958).

defined as per se unlawful, it is condemned without further scrutiny of the intent or actual competitive effects of the challenged conduct. The per se rule, however, is properly applied only to categories of conduct with which the judiciary has had sufficient experience to determine that their existence is almost always "manifestly anticompetitive," *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 434 U.S. 36, 50 (1977), so that rule of reason inquiry as to likely competitive effects is unnecessary and wasteful. *Id.* at 50 n.16; *White Motor Co.* v. *United States*, 372 U.S. 253 (1963).

One type of conduct that the Supreme Court consistently has held to be governed by the per se rule is price fixing agreements among competitors. See, *e.g.*, *Maricopa County*, *supra*; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927). The classic price fixing agreement is a naked agreement among horizontal competitors, ancillary to no other business relationship among the parties, to adhere to minimum prices. Early in the development of the antitrust laws the Supreme Court felt it had acquired sufficient experience to conclude that

> [t]he aim and result of [every agreement of this type], if effective, is the elimination of one form of competition . . . . Agreements which create such potential power [to fix prices] may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable . . . .

Trenton Potteries, *supra*, 273 U.S. at 397-98. And this conclusion that price fixing agreements are properly subject to per se condemnation has been reaffirmed in recent Supreme Court decisions as well. *Maricopa County*, *supra*, 102 S.Ct. at 2472-75; *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980).

Recognition that horizontal minimum price fixing agreements are illegal per se does not obviate the task of

determining whether particular practices that may affect price should be viewed as price fixing of the type deemed per se illegal. Not all concerted conduct that may affect price has been deemed price fixing. See, *e.g.*, *Cement Mfrs. Protective Ass'n* v. *United States*, 268 U.S. 588 (1925); *Joint Traffic*, *supra*, 171 U.S. at 567-68. Thus, the legality of information exchanges and product standarization practices has been ascertained under the rule of reason because of judicial recognition that such practices have significant procompetitive potential in certain circumstances. See, *e.g.*, *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U.S. 563 (1925); *United States* v. *Container Corp. of America*, 393 U.S. 333 (1969). Indeed, the Supreme Court has held that the mere fact that two parties have "literally" fixed the price of goods they sell does not necessarily result in a finding of per se illegality. *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1 (1979);[11] *accord*, Dist. ct. op. at 50. To determine whether the challenged conduct is properly characterized as "per se price fixing," (*Broadcast Music*, *supra*, at 9),

> [the] inquiry must focus on whether the effect and . . . the purpose of the practice are to threaten the proper operation of our predominantly free-market economy — that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . ., or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive."

Id. at 19-20 (footnote omitted). Accordingly, when defendants proffer justifications for an agreement, which, if

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[11] A contrary rule would have the effect of rendering per se invalid all partnership or joint venture agreements, as the Court noted when it stated, "When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." *Broadcast Music*, *supra* at 9.

proven, demonstrate that the totality of the agreement " 'increase[s] . . . efficiency and render[s] markets more, rather than less, competitive'," *Broadcast Music, supra*, at 20, the mere fact that prices are in some sense "fixed" does not automatically resolve the question of the agreement's legality under the Sherman Act.

On the other hand, the fact that a cooperative joint venture is involved does not mean that its conduct can never be condemned as unlawful without extensive inquiry. The nature of the joint venture's conduct — and not merely its designation as a joint venture — is determinative. See generally Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1521 (1982). If a quick examination reveals that it serves no purpose other than as a mechanism to fix prices, its conduct should be struck down as unlawful without further examination. But if examination discloses the possibility that a restraint may be necessary to conduct productive, efficiency-enhancing, or other procompetitive activity, further consideration under the rule of reason is appropriate.[12]

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[12] *Cf. United States* v. *Addyston Pipe & Steel Co.*, 85 F.271 (6th Cir. 1898), *mod. and aff'd.*, 175 U.S. 211 (1899), in which the validity of restraints were determined by whether they were ancillary to a legitimate cooperative endeavor on the part of the parties enacting them. Judge Taft stated the test as follows (*id.* at 282):

> [N]o conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract and necessary to protect the convenantee in the enjoyment of the legitimate fruits of the contract . . . .
>
> The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of the contract, it is void . . . .

This method of analysis is urged by Professor Bork. See R. Bork, *The Antitrust Paradox* 263-67 (1978).

Applying this analysis to the present case, we submit that the NCAA's television controls are not subject to invalidation under the per se rule. This case does not involve the direct fixing by competitors of the price or other terms of trade of a product or service with which the courts have had a great deal of experience. Nor does it involve a naked price restraint on the part of horizontal competitors having no legitimate cooperative relationship with one another. On the contrary, the NCAA has shown (and plaintiffs do not deny) that a certain amount of cooperation between the colleges is necessary and that its non-television regulations are desirable, if indeed not necessary, for the organization and survival of amateur intercollegiate athletics. And significantly for the present case, the NCAA contends that its television controls are necessary for the enforcement of those regulations. Moreover, it argues that the television controls are procompetitive in effect because they are necessary to provide televised collegiate football to consumers.

In essence the NCAA argues that its challenged conduct is necessary to allow the joint venture to offer a new product — ordinarily a procompetitive activity. It describes itself as a rulemaking and promotional association, like a trade association engaging in permissible regulatory behavior. It also describes itself as — and in fact comprises — a joint selling agency for its member institutions, which have agreed to transfer to it the sole authority to negotiate the sale of their output, *i.e.*, the right to broadcast games in which they participate. And joint selling agencies have not been subject to per se condemnation; rather, at least a limited scrutiny of the effect of the restrictions is appropriate. See, *e.g.*, *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344 (1933); L. Sullivan, *Antitrust* § 104 at 292-93 (1977).

To be sure, on further examination, as occurred at trial below, the NCAA's contentions may be shown to be either untrue, unproveable, true but insufficient to outweigh the anticompetitive effects of their restrictive conduct, or

simply irrelevant to the competitive issues cognizable under the Sherman Act. But the NCAA's contentions are not so patently frivolous as to permit their dismissal without at least some scrutiny as to the probable competitive effects of the challenged conduct. And the need for such an examination of competitive effects means, by definition, that application of a strict per se rule would be inappropriate. *White Motor Co.* v. *United States*, 372 U.S. 253 (1963); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).[13]

B. *The NCAA's Conduct Does Not Constitute a Group Boycott Subject to Per Se Condemnation*

The district court characterized the NCAA's conduct as a per se unlawful group boycott. It found that the boycott operated in two ways: by granting exclusive rights to certain networks, NCAA members agreed not to sell their products to other broadcasters; and a school that violated the television exclusivity rules could be expelled from the NCAA and thereby rendered unable to meet member schools in any athletic contest. Dist. ct. op. at 28-29, 62-67.

We submit that the district court erred in characterizing the NCAA's conduct as a group boycott subject to the

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[13] This analysis does not differ significantly from that employed by the district court. Although the court stated that the NCAA's controls constituted an agreement subject to per se condemnation, Dist. ct. op. at 62, it recognized that certain justifications may forestall application of the per se rule, and it reviewed the defenses raised by the NCAA to determine whether they were of this sort. *Id.* at 50-62. Thus the distinction between our analysis and that of the district court is primarily terminological: We submit that, after engaging in scrutiny of the procompetitive justifications proffered by defendants, it is a mischaracterization to state that if the justifications are rejected, the defendants' actions are then "per se" unreasonable. Rather, we believe that the district court actually and quite properly undertook a form of rule of reason analysis to determine whether the practice is an unreasonable restraint of trade, and that this fact should be acknowledged.

per se rule. Although the term "group boycott" has been used over the years in myriad situations, the per se rule has been applied to only narrower classes of activities whose clearly pernicious market effects warrant automatic condemnation. See L. Sullivan, *Antitrust* § 90 (1977). The classic boycott to which the courts have applied the per se rule "constitute[s] efforts by a firm or firms at one level to drive out competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." *Id.* § 92 at 261. The first of the district court's boycott characterizations is simply that of an exclusive dealing arrangement by a joint venture. Exclusive dealing contracts by their nature have the effect of denying the business covered to non-parties. But this alone has not been considered sufficient reason to strike down such arrangements as per se illegal. Rather, the antitrust legality of exclusive dealing contracts is determined under a rule of reason analysis. *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 74-80 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *Deesen* v. *Professional Golfers' Ass'n*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966); *cf. Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961).

There appears to be nothing in the exclusivity provisions at issue that warrants departing from the usual method of determining the legality of exclusive dealing contracts. While the selling party here (the NCAA) represents a combination of competitors, the exclusivity provisions, on their face, do not appear to be a naked attempt by a group of competitors to drive plaintiff competitors out of business. Rather, if as the NCAA alleges, the establishment of the joint venture is necessary to create a new product, legitimate reasons may exist for the joint venture to undertake the marketing of that product as well. Therefore, if the joint venture is permissible on balance because it allows a new product to be created, it would be improper to apply a per se rule to prohibit it from regulating the

marketing of that product without any review of the market circumstances affecting the relationship between the competitive restraints embodied in such marketing regulation and the justification therefor. Of course, analysis of the purpose and effect of the NCAA's intent and the effect of its conduct may compel a finding of illegality under the rule of reason, but the need for such an inquiry indicates that it is inappropriate to treat the challenged conduct as the type of group boycott deemed per se unlawful.

The district court's second boycott characterization would invalidate the efforts of any membership organization to regulate the behavior of its members with the sanction of expulsion. The courts have never held that a group's authority to expel its members renders the group structure tantamount to a group boycott and thus per se unlawful. The expulsion sanction is merely an enforcement vehicle for the underlying rules and policies of the group. Thus the important issue is the competitive reasonableness of the underlying rules (here, the NCAA's television controls), not the existence of sanctions for their violation. See, *e.g.*, *Molinas* v. *National Basketball Ass'n*, 190 F.Supp. 241 (S.D. N.Y. 1961); R. Posner, *Antitrust Law* 207-10 (1976). Again, the necessity for scrutiny of the underlying rule renders the application of per se analysis inappropriate.

II. THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE DISTRICT COURT'S CONCLUSION THAT, WHEN EXAMINED UNDER THE RULE OF REASON, THE NCAA'S CONDUCT VIOLATES SECTION 1 OF THE SHERMAN ACT

Because application of the per se rule is inappropriate, the challenged conduct must be examined under the rule of reason. This, however, does not mean that an exhaustive factual and economic analysis of every conceivable economic or other public interest issue raised by this case is required. On the contrary, any purported public benefits unrelated to the promotion of competition may not be con-

sidered in the antitrust balance. Thus, the Supreme Court has cautioned that "the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions." *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 688 (1978). The rule of reason, therefore, requires a court to weigh the injury to competition that may result from the challenged conduct against any enhancement of competition that could not be achieved without the restraint. The court thereby determines whether the restraint imposed "tend[s] to restrict competition and decrease output . . ., or instead [is] designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Broadcast Music, supra*, 441 U.S. at 20.

As discussed in detail below, the challenged conduct of the NCAA clearly "restrains" the freedom of NCAA members to negotiate independently for the sale of television rights to college football games. The NCAA alleges, however, that it acts as a joint venture in the development of the college football product and that the challenged restrictions are ancillary to and necessary for the attainment of legitimate competitive purposes. The proper analysis, therefore, is to review the justifications offered by the NCAA in light of the effect of the restraints demonstrated by plaintiffs, to determine whether the NCAA's restrictions are, on balance, procompetitive and output-enhancing or anticompetitive and output-reducing. Only if the NCAA introduces evidence demonstrating that the procompetitive effects of its joint venture efforts are dependent on the significantly anticompetitive provisions of its television rules would there be a need to balance such competitive benefits against the competitive restraints attributable to the challenged conduct. In the absence of any evidence demonstrating procompetitive potential, of course, expeditious condemnation is proper.

The challenged restraint in the present case, we submit, is properly subject to condemnation under a rule of reason analysis. The restraining effect of the NCAA's television rules on independent member sales hardly seems open to reasonable questioning, and the district court's findings in favor of plaintiffs on this point seem correct in view of the record. In any event they are not clearly erroneous. The district court also was correct on both legal and factual grounds in rejecting the justifications proffered by the NCAA in its attempts to defend its conduct from condemnation.

A. *The District Court Correctly Held That Plaintiffs Satisfied Their Burden of Showing the Significantly Anticompetitive Nature of the NCAA's Conduct*

1. "Congress designed the Sherman Act as a 'consumer welfare prescription'. R. Bork, The Antitrust Paradox 66 (1978)." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979). As such, the antitrust laws are intended to protect the competitive nature of markets in "our predominantly free-market economy," *Broadcast Music*, *supra*, 441 U.S. at 19, and to help guarantee that the quantity of goods and services sold and purchased and the levels of prices set in the various markets result from independent decisionmaking by the producers and consumers. In this way, competition policy seeks to foster the maximization of consumer welfare.

In the present case, independent decisionmaking by producers (the colleges) has been replaced by a joint venture, which has assumed the role of exclusive selling agent. Absent the constraints imposed on individual members' sales of regional and local television rights, it would be expected that the amount of such broadcasting would be greater than at present. Tr. 252-53, 537-39. The record contains evidence supporting the district court's finding that the prohibition of independent telecasting resulted in the restricted availability of football telecasts. Tr. 859-60, 1003-

07, 1305. Indeed, the district court found that the very purpose of the NCAA's policy was to limit individual member sales. Dist. ct. op. at 27-28. Equally significant as the reduction in available telecasts, however, is the fact that the controls artificially suppressed product diversity, by restricting the opportunity for regional or local broadcasts of individual college games of local interest, and by limiting the number of appearances on television by individual members. According to testimony these restrictions have reduced the opportunity for many smaller schools to appear on television (either locally or regionally), Tr. 252-53, 537-39, and have reduced the opportunities for the major football schools to appear (either on national or regional broadcasts) as frequently as they would otherwise be able. Tr. 370-71, 856-57.[14]

2. In an attempt to minimize the significance of the competitive distortions resulting from its television policy, the NCAA contends that it lacks market power with respect to advertisers who use other programming to reach their desired audiences. This is an attempt to misdirect the court's attention from the gravamen of plaintiffs' complaint. The extent of the NCAA's market power vis-a-vis television advertisers is not the relevant measure of the defendant's ability to restraint the competition here at issue. The essence of plaintiffs' complaint is not that advertisers are paying too much for network broadcasts. Rather, they correctly assert that *they* are being coerced into giving up their right to compete in the sale of their football television rights as the price of membership in a rulemaking joint

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[14] This type of collective suppression of product diversity can be as anticompetitive as collusive reductions in output. Such behavior interferes with consumer choice and can give rise to the same types of inefficiences that are the ultimate concern of all antitrust prohibitions, *i.e.*, reduced output of desired products and increased consumption of less desired substitute products. See, *e.g.*, R. Dorfman, *Prices and Markets* 155-56 (3d ed. 1978); R. Bork, *The Antitrust Paradox* 98-101 (1978).

venture, access to which is which necessary for participation in the full range of intercollegiate athletics. Thus, the NCAA's power in regulating intercollegiate athletics is the relevant factor in assessing the competitive effects of its restrictive televison rules. The existence of the NCAA as a national rulemaking body for intercollegiate athletics would seem to indicate that a national, all-inclusive, rules body may provide significant economies of scale and other advantages not provided by smaller or regional groupings of colleges. In essence, plaintiffs have demonstrated that the NCAA, comprised as it is of all the major college athletic competitors, has utilized the advantages conferred by its joint venture structure and its position as an industry-wide rulemaking body to condition access (i.e., membership) on each member's willingness to sacrifice certain competitive prerogatives with respect to telecasting its games.

In response to this argument, the NCAA seeks to denigrate the competitive significance of its restriction. It argues that the plaintiffs have felt no antitrust injury because they could form their own supervisory organization. NCAA brief at 50. The district court, however, properly held that the NCAA's disclaimer of market power lacks credibility in view of the fact that all of the major competitors in college athletics are members that it regulates. More importantly, the NCAA offers no satisfactory explanation why plaintiffs should bear the unnecessary costs of seeking to create a duplicative national rules body because they refuse to acquiesce in the NCAA's attempt to impose competitive restraints not justified by the needs for cooperation that justify the joint venture itself. Collaborative efforts by all of the major competitors in any market raise the danger of a diminution in competition. Society tolerates that risk when significant competitive benefits are dependent on industry-wide collaboration. But because of the competitive risks posed by such wide-scale collaboration, no public interest is served — and the interests of consumers may be directly harmed — if competitive restraints un-

related to the proper conduct of legitimate regulatory functions are tolerated. See, *e.g.*, *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); *Associated Press* v. *United States*, 326 U.S. 1 (1945).

B. *The District Court Properly Rejected the Justifications Proffered for the NCAA's Television Restrictions*

The NCAA has argued that in the creation of the product college football, it functions as a joint venture, similar to the performing rights societies in *Broadcast Music*. But, as indicated *supra* at 23-26, the fact that the NCAA performs some legitimate joint venture activities only serves to begin the rule of reason inquiry, not end it.[15] In view of the significant restraining characteristics of its television

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[15] Peculiarly, the NCAA later compares itself to a cartel, and argues that its agreement should not be "red-penciled" to save the portions that benefit plaintiffs and strike down those that harm them. NCAA brief at 50-52. The cartel description is plainly inconsistent with its earlier assertions (NCAA brief at 11-14, 17-20) that it does not operate simply as a cartel imposing naked restraints upon competition, but rather acts as a joint venture in which there is partial integration of the business activities to perform functions that are properly the subject of collaboration. Thus this is not a case in which plaintiffs benefit from some of the illegal behavior of a cartel and are harmed by other parts. Rather, the "benefits" discussed in this case are the productive activities of the joint venture, and the "harms" flow from some joint venture conduct found by the district court to be unrelated to the conduct of those legitimate activities. Indeed, the fundamental question of this case, as acknowledged by all the parties, is the relationship between the legitimate NCAA functions and the challenged conduct. And if the challenged conduct is unrelated to or unnecessary for the achievement of its legitimate functions, it may be prohibited. Indeed, contrary to the NCAA's "red-penciling" argument, the Supreme Court has repeatedly held that when restraints are found to be overbroad in relation to legitimate joint activities, the restraints alone may be excised while the valid portions saved. See, *e.g.*, *Silver*, *supra*, at 361-67; *Associated Press*, *supra*, at 21-23; *United States* v. *Terminal R. Ass'n of St. Louis*, 224 U.S. 383, 409-12 (1912).

restrictions, the NCAA had the burden of demonstrating a sufficiently strong relationship between the restraints and the capability to conduct the productive activities.[16] The NCAA did in fact proffer several justifications, and the district court heard the evidence presented as to their validity. It then concluded not only that the NCAA had failed to carry its burden of proof, but also that plaintiffs' evidence was more convincing. We believe that sufficient evidence exists to sustain the conclusion reached by the district court.[17]

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[16] The NCAA later argues, by analogy to the *in pari delicto* defense, that because plaintiffs admittedly received some benefits from its activities, they have suffered no net antitrust injury," and thus may not bring this suit. NCAA brief at 53-55. This argument is unsupportable. The courts have stated that the accrual of benefits to plaintiffs from challenged conduct does not prevent the allegation of antitrust injury necessary for standing. See, *e.g., Smith* v. *Pro-Football, Inc.*, 593 F.2d 1173, 1175 n.2 (D.C. Cir. 1978). In addition, in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), the Supreme Court held precisely to the opposite effect of that asserted by the NCAA. That case held that the policy in favor of antitrust enforcement is sufficiently important that partial participation in the challenged conduct does not prevent standing to private plaintiffs. Rather, it has the limited effect of reducing the amount of damages the plaintiff may receive. But this is of no concern in an injunctive suit, such as the present, where plaintiffs will receive no windfall or improper benefit from the relief in this case.

Finally, this issue is irrelevant in the present case because, as discussed at n.15 *supra*, the "benefits" accruing to plaintiffs were the result of the NCAA's legitimate joint venture regulatory activities. Thus these benefits do not derive from the plaintiffs' participation in cartel behavior, which in the context of *in pari delicto* would have to be offset against any harms inflicted by the cartel.

[17] In particular we believe that the NCAA has failed to explain the necessity of its assuming the role of exclusive selling agent for the colleges, *i.e.*, how the product would be damaged if colleges were granted the right to contract independently with local stations for the broadcasting of individual games.

[APPENDIX]

1. The NCAA maintains that its television controls are necessary to maintain a competitive balance among the teams that play against one another on television. It argues that absent some means to retain parity among the competing teams, superpowers would develop that will consistently crush their rivals. Consumers would tire of predictable events, and televised football would be replaced by other entertainment that provides the crucial ingredients of close matches and vigorously-competing participants. NCAA brief at 25-27. The district court correctly rejected this argument.

There is little, if any, evidentiary support for the NCAA's position. As the district court noted, the NCAA has not felt the need to impose restrictions upon the telecasting of college basketball games, even though the need for competitive balance, it may be presumed, is as urgent in that sport as it is in football. Dist. ct. op. at 8. The result has not, apparently, been a disastrous imbalance in basketball competition. Indeed, the recent increase in the number of teams (from 32 to 48) which are invited to participate in the NCAA basketball championships indicates that elimination of the ability of member schools to compete in the sale of television rights to their games is not necessary to promote adequate competitive balance. Moreover, witnesses testified that a loosening of the NCAA's restrictions would result in the proliferation of televised football on the local and regional levels, Tr. 252-53, 537, with a concomitant increase of television income to those colleges unable to appear under the NCAA controls. Thus to the extent that such income may be translated into com-

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[17] (Continued)

Indeed, the court below noted this as a major distinction between the present case and *Broadcast Music*, in which, although the performing rights societies organized umbrella sales agreements, individual authors retained the power to sell the performing rights to their compositions on an individual basis. Dist. ct. op. at 55-56.

petitive ability, the restrictions actually may work to impede attainment of the goal of competitive balance.[18]

The NCAA, of course, offered conflicting testimony. But as the district court noted, although various witnesses for the NCAA argued that the restrictions were necessary, none "was able to articulate any credible reason as to *why*. . . ." Dist. ct. op. at 58-59 (emphasis in original). In essence the district court found that the NCAA has attempted to justify its television restrictions, which have a clear and immediate restraining effect upon the marketing aspects of college football television rights, in terms of, at best, indirect and speculative benefits to the competitive balance and amateur status of the sport. In this circumstance, the court did not err in dismissing this defense. Indeed, the district court properly dismissed the competitive balance justification because the NCAA failed to demonstrate that the full panoply of its television restrictions has any direct bearing on the attainment of this goal.[19]

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[18] The idea that a nation of over two hundred million citizens can not produce a sufficient number of skilled college football players to provide reasonable competitive balance strains credulity. In any event, there is no evidence that competitive parity throughout the entire NCAA Division I membership is necessary to provide football that consumers will want to support. It is well known that there exist significant disparities between the qualitative level of football played in different conferences, *e.g.*, compare the "Big Eight" to the "Ivy League." Nonetheless, there are many supporters of "Ivy League" football. At best, there appears to be a need for some semblance of competitive parity within a conference, but the NCAA made no attempt to justify its national restrictions on the basis of such intra-conference needs.

[19] In an attempt to avoid the "clearly erroneous" rule, the NCAA argues that the district court acted improperly by "simply reject[ing]" the evidence that "the television rules promote balance." NCAA brief at 26. It dislikes the fact that the district court rejected the tesimony the NCAA presented because the court found that the winesses "could not adequately verbalize why the effect occurs." *Ibid.* The district court, however, did not "simply reject" the NCAA's evidence. It found it to lack credibility

2. The district court also correctly rejected the NCAA's contention that uncontrolled telecasting would result in the reduction of live attendance at college football games. To the extent that this is but a variant on the argument regarding competitive comparability, it suffers the same defects discussed above. In addition, the live gate defense is justified only on the unsupported grounds that "live attendance is the lifeblood of many schools," and that "di-

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[19] (Continued)

compared to the conflicting evidence proffered by the plaintiffs. The NCAA's effort to avoid the "clearly erroneous" rule with respect to the district court's factual findings, therefore, must be rejected. In addition, the NCAA misconceives the role of the parties and the court at trial. As noted above, once plaintiffs satisfied their burden of demonstrating significant anticompetitive effects attributable to the challenged conduct, the burden shifted to the NCAA to show that the restraints were needed in order to sustain its procompetitive activiites. That is, to the extent that competitive balance among football teams may be considered an integral part of the college football product created by the joint venture, the NCAA was required to come forward with evidence that the television controls were directly responsible for the attainment of that end. The role of the court is to determine the credibility of the witnesses and whether their testimony satisfied the burden of proof when considered against the conflicting evidence presented by the other parties. Thus the court was not restricted to rejecting the evidence only if it was "illogical" or "if there were contrary evidence." NCAA brief at 26. Even if the evidence were fully logical and uncontroverted, the court could determine that it was insufficient to satisfy the burden placed on defendant.

In this case, the district court reviewed the evidence and determined that it did not satisfy the burden. That decision must be affirmed unless clearly erroneous, and the NCAA has failed to show that the court's finding was clearly erroneous. A review of the testimony cited (NCAA brief at 26 n.7) in fact reveals that the district court's finding not only was not clearly erroneous but was quite correct. Most of the NCAA's testimony consists of either the worry that in the absence of controls football powerhouses would develop, acknowledgments that television exposure helps recruitment, or unsupported assertions that the television controls help achieve competitive balance. No evidence was presented to explain how they do so.

version of audience to TV may undermine college sports at other schools, reducing the effectiveness of competition and the amount of enjoyment from live attendance in general." NCAA brief at 20-21. These dire predictions simply are unsupported by evidence.

To the extent that the NCAA and amicus ABC contend that there are noneconomic reasons for protecting the live gate of smaller schools, and that the NCAA's television restrictions are necessary to achieve such noneconomic ends, the argument is irrelevant to antitrust analysis.[20] Indeed, it is the type of defense rejected by the Supreme Court in *National Society of Professional Engineers*, *supra*, 435 U.S. at 689-92. Congress enacted the antitrust laws to implement a fundamental policy of competition. While Congress may determine that antitrust policies should give way to other regulatory methods and objectives by creating an antitrust exemption, it is improper for private parties or the courts to indulge in a balancing of policies and conclude that the goals expressed by Congress in the antitrust laws should be overridden. *Ibid.* Resolution of such conflicts is properly obtained from Congress itself, the body with the authority to weigh and select from among conflicting social policies.

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[20] Indeed, one would be hard put to define the protection of weak competitors from the rigors of the marketplace as "procompetitive." The defense that the NCAA has engaged in anticompetitive conduct to assist weak competitors ignores the repeated assertion that the purpose of the antitrust laws is to protect competition, not specific competitors. See, *e.g.*, *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962); *Atlas Bldg. Prods. Co.* v. *Diamond Block & Gravel Co.*, 269 F.2d 950, 954 (10th Cir.), *cert. denied*, 363 U.S. 843 (1959).

III. PLAINTIFFS HAVE ALLEGED ANTITRUST INJURY AND THUS ARE THE PROPER PARTIES TO BRING SUIT

The NCAA's argument that plaintiffs have failed to establish antitrust injury and therefore are not the proper parties to seek relief (NCAA brief at 45-55) is contrary to overwhelming legal precedent and finds no support in the statutory language or legislative history. Section 4 of the Clayton Act, 15 U.S.C. 15, provides a private treble damage remedy for any person suffering injury to its "business or property" as a result of an antitrust violation. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330 (1979). Plaintiff, are alleging precisely that type of injury to the extent they assert that they are being deprived of the extra income they would obtain if they were allowed to sell the television rights to their football games in a competitive market. Plaintiffs, of course, are seeking injunctive relief under Section 16 of the Clayton Act, not damages. Their standing to sue for damages, however, is relevant to their standing to sue for injunctive relief since it has been held that standing requirements under Section 16 are lower than under Section 4. See, *e.g.*, *Schoenkopf* v. *Brown & Williamson Tobacco Co.*, 637 F.2d 205, 210 (3d Cir. 1980); *Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129, 1132 (5th Cir. 1975); In re *Multidistrict Vehicle Air Pollution M.D.L. 31*, 481 F.2d 122, 130-31 (9th Cir.), *cert. denied sub nom. Morgan* v. *Automobile Mfrs' Ass'n*, 414 U.S. 1045 (1973). *Cf. Hawaii* v. *Standard Oil Co. of California*, 405 U.S. 251, 260-61 (1972).[21]

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[21] The distinction between the two sections for standing purposes is sensible from the view of the policy that caused the courts to erect standing restrictions for antitrust damage actions — the fear of redundant recoveries or the litigation expense and complexity necessary to measure incidental harm. Obviously this fear is irrelevant in an injunctive suit, so the need to limit the universe of potential plaintiffs in a § 16 case is less urgent. *Schoenkopf*, *supra*, at 210; *Jeffrey*, *supra*, at 1132; *Multidistrict Vehicle Air Pollution*, *supra*, 481 F.2d at 130

The NCAA relies on *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), for the asserted proposition that the antitrust laws are designed to protect consumers, not producers, and that, therefore, suits by producers should be faced with "suspicion." NCAA brief at 46-47. That reliance is misplaced. Nothing in *Brunswick* indicates an intention on the part of the Supreme Court to overrule the numerous cases that have allowed competitors to recover for financial injury suffered as a result of an antitrust violation that denied them the ability to compete in the market.[22] In *Brunswick* itself the Court denied the plaintiff recovery not because it was a competitor of the defendant, but rather because the alleged harm flowed from an enhancement rather than a crippling of competitive conditions. In the present case, however, plaintiffs have alleged and indeed demonstrated that their injury resulted directly from "the anticompetitive effect . . . of the violation . . . ." *Brunswick, supra* at 489. Thus they are precisely within the group of parties that have demonstrated antitrust injury for the purpose of Section 4.

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[22] Among the many cases allowing injured competitors to sue for treble damages are *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967); *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir.), *cert. denied*, 444 U.S. 1093 (1980); *Atlas Bldg. Prods., supra.* Similarly, the standing of such competitors to seek injunctive relief under Section 16 is well recognized. See, *e.g., Utah Pie, supra*; *International Tel. & Tel. Corp.* v. *General Tel. & Electronics Corp.*, 518 F.2d 913 (9th Cir. 1975); *Credit Bureau Reports* v. *Retail Credit Co.*, 476 F.2d 989 (5th Cir. 1973).

IV. THE INJUNCTIVE RELIEF GRANTED IS APPROPRIATE TO THE ANTITRUST VIOLATION FOUND, AND ANY QUESTION DEFENDANTS HAVE AS TO THE SCOPE SHOULD BE DIRECTED TO THE DISTRICT COURT IN THE FIRST INSTANCE

On finding a violation of the antitrust laws, the district court has broad discretion in fashioning relief. See, *e.g.*, *Zenith Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 132-33 (1969); *International Salt Co.* v. *United States*, 332 U.S. 392, 400-01 (1947). Its remedial judgment may be set aside only if it constitutes an abuse of discretion. See, *e.g.*, *United States* v. *National Lead Co.*, 332 U.S. 319, 334-35 (1947); *William Goldman Theatres, Inc.* v. *Loew's, Inc.*, 164 F.2d 1021 (3d Cir.), *cert. denied*, 334 U.S. 811 (1948). We submit that the injunctive relief entered by the district court is reasonably related to the antitrust violation found, and accordingly should be affirmed.

1. The function of injunctive relief in an antitrust case is to prohibit repetition of the illegal conduct and to restore competitive market conditions. *International Salt*, *supra*, at 401; *National Lead*, *supra*, at 335; In re *Multidistrict Vehicle Air Pollution*, 538 F.2d 231 (9th Cir. 1976). While a district court has the discretion to determine that a prohibitory injunction is unnecessary due to the defendant's promise not to repeat its prior illegal conduct, issuance of a prohibitory injunction is the norm, rather than an abuse of the district court's broad remedial discretion. *Zenith*, *supra*, at 132; *United States* v. *Ward Baking Co.*, 376 U.S. 327 (1964). For these reasons we strongly disagree with the NCAA's recommendation (NCAA brief at 61) that it simply be "relieved" of the provisions of the injunction and that any subsequent television controls it devises be scrutinized anew under the antitrust laws. Certain conduct by the NCAA has already been adjudged in violation of the antitrust laws. On the basis of this holding, it is entirely appropriate that the NCAA be prohibited from continuing to engage in such conduct. It would simply

waste judicial resources and impose an improper burden on the plaintiffs to stay the district court's hand now and require a relitigation of the same questions at some future date in the context of whatever new controls and contracts the NCAA establishes.

2. The NCAA asserts (NCAA Br. at 55-57) that paragraph 3 of the injunction either is unduly vague or overly broad to the extent that it prohibits conduct not related to the violations found. We believe, however, that when read in light of the violations found, the decree is reasonably clear, and that any questions the NCAA has as to whether the injunction would bar it from taking various actions related to the televising of individual member football games should be directed, in the first instance, to the district court.

Paragraph 3 of the injunction imposed by the district court prohibits the NCAA "from enforcing or attempting to enforce the provisions of the contract above described and from making any other contract of similar kind or nature in the future." We submit that this language should be construed in light of the violation found. The essence of the NCAA's restrictive conduct is its arrogating to itself the role of exclusive selling agent, *i.e.*, forbidding individual schools from independently selling the television rights to their games to network or local broadcasters. Consequently, the language "other contract of similar kind or nature" is best read as referring to provisions that would have the practical effect of depriving member schools of the right independently to market their games in order to promote joint selling of that product.

Read in this light, the district court's decree would not raise many of the concerns expressed by the NCAA in its brief.[23] For example, contrary to the NCAA's assertion

[23] On the other hand, certain of the NCAA's suggestions, such as a system of "pass-over payments" and continued blackout rules to protect live attendance, *id.* at 58-59, should not be accepted, because they retain aspects of the present scheme that have been determined to be anticompetitive.

(NCAA brief at 60), nothing in the district court's opinion or decree would prohibit the NCAA from banning a member school's appearance on television because of its violation of the various NCAA regulations directly designed to preserve the amateur nature of the sport and to equalize the inputs devoted to the game (*i.e.*, the number of scholarships and coaches, time allowed for practice, etc.). The purpose of such sanctions is not to interfere with competitive marketing; therefore, the decree cannot be read reasonably to constrain the NCAA's sanctioning powers in that respect. Similarly, we do not share the NCAA's concern (NCAA brief at 58) that the decree prohibits it from contracting with television exhibitors for an "NCAA game of the week" season package in which participation by individual member schools would be optional. This would preserve the other competitive options of member schools and allow the NCAA to offer a product in competition with those offered by other producers, thereby providing consumers with the multiplicity of supplier options characteristic of a competitive market. By a similar line of reasoning, we do not share the NCAA's concern (*ibid.*) that the decree would prohibit it from contracting for the telecasting of post-season playoffs for football, as it does in basketball. Since the participants in such games are not known until shortly before they occur and there may be a need for advance planning by broadcasters, it would not unduly restrain any individual member's rights for the NCAA to act as a selling agent for the advance sale of television rights to its post-season playoffs. In any event, neither the district court's opinion nor its decree focused on the televising of post season playoffs, and any questions on that subject, therefore, should be addressed, in the first instance, to the district court.

CONCLUSION

The jugdment of the district court should be affirmed.

Respectfully submitted.

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